(16,293.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 1003.

THE RICHMOND AND ALLEGHANY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE R. A. PATTERSON TOBACCO COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 8, 1896.

1 The petition of The Richmond and Alleghany Railroad Company, H. L. Terrell, surviving trustee of himself and Thomas S. Bocock, deceased, trustees; Henry M. Alexander, surviving trustee of himself and Henry K. Ellyson, deceased, trustees, respectfully shows that on the 12th day of March, 1896, the supreme court of appeals of Virginia rendered a final decree against your petitioners in a certain cause wherein The R. A. Patterson Tobacco Company was complainant and your petitioners were defendants, your petitioner The Richmond and Alleghany Railroad Company, H. L. Terrell, surviving trustee of himself and Thomas S. Bocock, deceased, trustees; Henry M. Alexander, surviving trustee of himself and Henry K. Ellyson, deceased, trustees, being the appellant of record in the said supreme court of appeals of Virginia and the said R. A. Patterson Tobacco Company being the appellee, affirming the decree of the circuit court of the city of Richmond for the amount of appellee's claim and costs, as will appear by reference to the record and proceedings in said cause, and that the said supreme court of appeals of Virginia is the highest court in said State in which a decision in the said suit could be had; and your petitioners claim the right to remove said decree to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because in said suit was drawn in question the validity of a statute of the said State of Virginia, to wit, section 1295 of the Code of Virginia, which is as follows:

"SEC. 1295. Liability of carrier for loss or injury to goods.—When a common carrier accepts for transportation anything, directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge"

2 on the ground of its being repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, as appears by the record of the proceedings in said cause, which is herewith submitted. Wherefore your petitioners pray the allowance of a writ of error, returnable into the Supreme Court of

the United States, and for citation and supersedeas; and your petitioner- will ever pray, etc.

RICHMOND & ALLEGHANY
RAILROAD CO.
H. L. TERRELL,
Surviving Trustee.
HENRY M. ALLEXANDER,
Surviving Trustee,
By COUNSEL, *Petitioners.*
H. T. WICKHAM,
H. TAYLOR, JR.,
Attorneys for Petitioners.

In the Supreme Court of Appeals of Virginia.

Desiring to give the petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, and that the same be made a supersedeas, the bond, in the penal sum of one thousand dollars ($1,000), herewith presented being approved.

In testimony whereof witness my hand this 27 day of April, 1896.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

3 *Assignment of Error.*

In the Supreme Court of the United States.

In the Matter of the Petition of the RICHMOND AND ALLEGHANY RAILROAD COMPANY, H. L. Terrell, Surviving Trustee of Himself and Thomas S. Bocock, Deceased, Trustees; Henry M. Alexander, Surviving Trustee of Himself and Henry K. Ellyson, Trustees, Appellants,
against
THE R. A. PATTERSON TOBACCO COMPANY, Appellee.

The appellants, by their attorney, say that in the record and proceedings in the above-entitled matter there is manifest error, *to* this, to wit:

That in said proceedings is drawn in question the validity of a statute of the State of Virginia, to wit, section 1295 of the Code of Virginia, which is as follows:

"SEC. 1295. Liability of carrier for loss or injury to goods.—When a common carrier accepts for transportation anything, directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such ac-

ceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge"

upon the ground of its being repugnant to article 1, section VIII, clause 3, of the Constitution of the United States, which is as follows:

"3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes"

and the decision of the highest court of the State of Virginia in which a decision could be had in said proceedings is in favor of the validity of said State statute, as appears by the record of said proceedings.

H. T. WICKHAM,
H. TAYLOR, JR.,
Att'ys for Appellants.

4 [Endorsed:] Richmond & Alleghany Railroad Co. & others *v.* R. A. Patterson Tobacco Co. Petition for writ of error, &c.

5 VIRGINIA:

In the Supreme Court of Appeals, on Thursday, March 12th, 1896.

Be it remembered that heretofore, to wit, at a supreme court of appeals, on Thursday, March 9th, 1893, upon the petition of the Richmond and Alleghany Railroad Company, an appeal is allowed it and supersedeas awarded to a decree pronounced by the circuit court of the city of Richmond on the 14th day of February, 1893, in the causes pending in said court under the style of Terrell and Bocock, trustees, against The Richmond and Alleghany Railroad Company and others, and Alexander and Ellyson, trustees, against the same, and in which suit the R. A. Patterson Tobacco Company filed a petition, upon the petitioner or some one for it entering into bond, with good security, in the clerk's office of the said circuit court, in the penalty of five hundred dollars and with condition as the law directs; which petition, with the transcript of the record accompanying the same, is as follows:

6 *"Petition.*

In the Supreme Court of Appeals of Virginia, at Richmond.

RICHMOND AND ALLEGHANY RAILROAD COMPANY
vs.
R. A. PATTERSON TOBACCO COMPANY.

To the honorable judges of the supreme court of appeals of Virginia:

The petition of the Richmond and Alleghany Railroad Company respectfully shows to your honors that it is aggrieved by a decree rendered by the circuit court of the city of Richmond, on the fourteenth day of February, 1893, in the chancery causes therein depending under the style of Terrell and Bocock, trustees, *vs.* Richmond and Alleghany Railroad Company and others, and Alexander and Ellyson, trustees, *vs.* same.

These suits are bills of foreclosure, filed against the Richmond and Alleghany Railroad Company by the trustees in its several mortgages, and for the appointment of a receiver. Receivers were appointed, and for several years the road was operated by them, until April, 1889, when the property was sold.

A transcript of so much of the record as may be necessary to the correct understanding of the decree complained of is herewith presented. An inspection of the record will show that on August 1, 1888, the R. A. Patterson Tobacco Company delivered to the receivers of the Richmond and Alleghany Railroad Company, at Richmond, Virginia, a lot of tobacco, consigned to Mann & Levy, at Bayou Sara, Louisiana, to be transported in accordance with the bill of lading filed with the petition of the R. A. Patterson Tobacco Company. This tobacco was lost after the same had passed out of the possession of the Richmond and Alleghany Railroad Company, and the R. A. Patterson Tobacco Company filed its petition in these causes, which are retained on the docket of the circuit court of the city of Richmond for the purpose of affording an opportunity for the adjustment of unsettled claims arising during the receivership. The answer of the Richmond and Alleghany Railroad Company was filed, setting up, amongst other defences, "that, even if the statements contained in said petition were true, no liability would be incurred by respondent for the following reason—to wit: Respondent has been informed, and believes and charges, that the loss referred to occurred beyond the terminus of its line, and upon a connecting line over which it had no authority or control."

This matter came on to be heard upon the petition, the bill of lading filed therewith, the answer of the Richmond and Alleghany Railroad Company, and the following facts agreed: "That the bill of lading was not signed by the shipper or their agent; that the shipment was an interstate one, and the tobacco was delivered by the Richmond and Alleghany Railroad Company to the next succeeding carrier, and was lost after the same had left the possession

of the Richmond and Alleghany Railroad Company; that the sole question submitted to the court and passed on was whether section 1295, Code of Virginia, 1887, was in conflict with article I, section 8, clause 3, of the Constitution of the United States, it being admitted that if said section, 1295, was constitutional the defendant was liable; but if it was not constitutional, then, under the contract of shipment, the defendant was not responsible."

7 The bill of lading, amongst other things, provides: "Consigned to Mann & Levy, at Bayou Sara, La., to be transported by the Richmond and Alleghany railroad to ——, and there to be delivered to connecting railroad or water line, and so on by one connecting line to another, until they reach the station or wharf nearest to the ultimate destination, * * * it is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier, * * * in case of loss, * * * imposing any liability hereunder the transportation company or carrier in whose actual custody they were at the time of such loss, * * * shall alone be responsible therefor. * * * The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to abide by all its stipulations, exceptions, and conditions, as fully as if they were all signed by such shipper, owner, and consignee. This bill of lading is signed for the different carriers who may engage in the transportation, severally, but not jointly, and each of them is to be bound by and have the benefit of all the provisions thereof as if signed by it, the shipper, owner, and consignee."

This contract or bill of lading was not signed by the shipper, and under section 1295 of the Code of Virginia, 1887, the judge of the circuit court of the city of Richmond held that your petitioner was liable for the loss of the goods after the same had left its possession, because of the requirement of said section, which is as follows:

"When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point or destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent; and although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor unless within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge."

Your petitioner submits that the judge committed a grave error in holding this act not in conflict with article I, section VIII, clause 3, of the Constitution of the United States, for the following reasons:

1. The contract was for an interstate shipment, and was, therefore, commerce between States.

2. Section 1295 prescribes certain terms and conditions on which this contract shall be made, attempts to regulate said contract; to define the rights of the parties under the same.

3. Where the subject of a contract is the transportation of articles of commerce from one State to another, the sole and exclusive power to prescribe its terms is vested by the Constitution in Congress, and no power is left in the State by which it can make any regulation; and non-action on the part of Congress means that there shall be no regulation by the State.

I.

There can be no transportation from one State to another by a common carrier without a contract entered into between him and the shipper. This contract may be either express or implied, written or verbal, but a contract of one or the other kind is an essential factor, without which there can be no transportation. It is that on which transportation depends; and any regulation of the contract must necessarily be a regulation of commerce. That transportation is commerce has been so often decided by the Supreme Court of the United States that no citation of authority is necessary. It would be idle to say that the State cannot regulate transpor-
8 tation between the States, and at the same time admit its power to regulate the contract without which there can be no transportation. Any regulation therefore of the contract of transportation must, of necessity, be a regulation of commerce. In Railroad Co. *v.* R. R. Com. of Tenn., 19 Fed. Rep., 679, Hammond, J., at page 710, says: "But when a plain and unmistakable case of direct action on the commerce itself is presented, as all regulations or restrictions on the contract of transportation must be, all that need be looked to is the character of the commerce so regulated, and if it be interstate transportation, as defined in the cases cited, regulation or restriction by the State is void."

In Tel. Co. *v.* Pendleton, 122 U. S., 347, a statute of Indiana required messages to be sent in the order in which they were received, and that the messages should be delivered by messenger when the recipient lived within one mile of the office. Here was an attempt to add to the terms of every contract made for the transmission of messages, and it was held by the court that the Indiana statute was void; the power to make such regulations residing only in Congress.

This matter has been well expressed by a recent writer in a volume entitled "The Railroads and the Commerce Clause," by Francis Cope Hartshorne, when he says at page 87: "But if it be essentially an attempt on the part of the State to deal with matters which are more properly the subject of contract between the carrier and the person employing him, then it is an attempt to restrict his freedom in making contracts, and must be void when the contract sought to be made is one in the course of interstate transportation * * * all rights, duties and liabilities which have their origin in a contract between the parties, and have no connection with the good order, peace and safety of the community; but only with the convenience or commercial advantage of the contracting parties, can only be modified or added to by the authority which has exclusive jurisdiction of the subject-matter of such contract."

In Almy *vs.* California, 24 How., 169, Chief Justice Taney, at pages 173–'4, says, when speaking of the constitutional prohibition on any State to impose a tax on imports or exports: "If the tax was laid on the gold or silver exported every one would see that it was repugnant to the Constitution of the United States. * * * But a tax or duty on the bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another, and consequently a duty upon that is in substance and effect a duty on the articles exported." So, in this case, any limitation or regulation of the bill of lading is a limitation or regulation of commerce between the States. It makes no difference whether the regulation is wise or unwise, whether it does, or does not, impede or hamper commerce, nor whether it does, or does not, discriminate. The question is, Can the State act — all? It is a question of power. Congress has the exclusive power, therefore the State, in a case of this kind, can have no power.

The State of Missouri attempted by statute to impose certain liabilities on railroads when engaged in interstate commerce, the particular liability imposed being that any railroad transporting cattle through Missouri, coming from certain portions of the country, should be liable for all damages sustained by residents along the line of the road if their cattle died from a certain kind of fever, and the fact that the cattle died from the fever should be *prima facie* evidence that they took it from the cattle being transported on the railroads. This statute came under review in R. R. Co. *vs.* Husen, 95 U. S., 465, and was held unconstitutional, being a restriction and an attempt to impose liability on interstate commerce just as an attempt is here made by section 1295 to impose liability and to regulate an essential instrument of interstate commerce.

9

II.

An examination of section 1295 is all that is necessary to show that it prescribes how this contract shall be made, imposes certain obligations in case the contract is not made in the manner prescribed, and even though made in the manner prescribed, imposes further and additional obligations unless some other thing is done by the carrier. Clearly, then, this section not only prescribes the manner in which this contract shall be made, but, even if it is made as prescribed, one of the contracting parties must do some other and further act before it shall have the benefit of the contract. It prescribes a penalty for failure to make the contract in the mode prescribed, thus in effect saying that the parties shall not make such a contract as they may deem best for their mutual benefit. That this is a regulation of the contract is too plain to be disputed, and if a regulation of the contract of transportation it is a regulation of commerce. Once allow the State to regulate the contract, you thereby give absolute control of the whole subject to the State, while the Constitution vests it in Congress.

III.

In Walton *vs.* State of Missouri, 91 U. S., 275, it is said by Mr. Justice Field, delivering the opinion of the court, page 280: "Where the subject to which the power" (to regulate commerce) "applies is national in its character or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority; it will not be denied that that portion of commerce with foreign countries, and between the States, which consists of the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation."

The same judge, delivering the opinion of the court in County of Mobile *vs.* Kimball, 102 U. S., 691, speaking of the power to regulate commerce, says on page 697:

"The subjects, indeed, upon which Congress can act, under this power, are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce to a foreign country, or between the States, which consists in the transportation, purchase, sale, and exchange of commodities. There can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases, with respect to any particular commodity, or mode of transportation, is a declaration of its purpose that the commerce in that commodity, or by that means of transportation, shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history, that the object of vesting in Congress the power to regulate commerce with foreign nations, and amongst the States was to insure uniformity of regulation against conflicting and discriminating States' legislation. Of the class of subjects, local in their nature, or intended as mere aids to commerce, which are best provided for by special legislation, may be mentioned harbor pilotage, bouys, and beacons to guide mariners to the proper channel in which to direct their vessels."

In Brown *vs.* Houston, 114 U. S., 622, Mr. Justice Bradley, delivering the opinion of the court, says (pp. 630–'1): "All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the Government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the States, it thereby indicates

its will that commerce shall be left free and untrammelled,
10 and any regulation of the subject, by the States, is repugnant to such freedom. This has been frequently laid down as law in the judgment- of this court."

In Bowman *vs.* C., &c., R'y Co., 125 U. S., 465, Mr. Justice Matthews, delivering the opinion of the court, after referring to certain sections of the Revised Statutes, says (p. 485): "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress. On this point the language of this court in the case of The County of Mobile *vs.* Kimball, 102, U. S., 691-'7, is applicable. Repeating and expanding the idea expressed in the opinion in the case of Colley *vs.* Board of Port Wardens, 12 How., 299."

The learned judge then proceeds to quote at length the passage we have already extracted from the opinion of the court in the case of County of Mobile *v.* Kimball.

We deem it unnecessary to refer particularly to what is said in other decisions of the Supreme Court of the United States, believing that the passages, already quoted, show the firmly settled rule on this subject, and content ourselves with referring to the following as some of the many additional cases which establish it: (Gibbons *v.* Ogden, 9 Wheaton, 1; State Freight Taxe Cases, 15 Wall., 232, see 279; Henderson *v.* Mayor, N. Y., 92 U. S., 259, see 273-'2; Hall *v.* Decuir, 95 U. S., 485, see 490; Gloucester Ferry Co. *v.* Penn., 114 U. S., 196, see 203-'4; Walling *v.* Michigan, 116 U. S., 446, see 455; Leisey *v.* Hardin, 135 U. S., 100; N. & W. R. R. Co. *v.* Penn., 136 U. S., 114.)

This is no new question in this court. The whole matter was most elaborately discussed in Norfolk & Western Railroad Co. *v.* Commonwealth, 88 Va., 95, and with this case before it your petitioner is at a loss to know upon what grounds the circuit court of the city of Richmond rested its decision. Section 3801, Code of Va., 1887, came under consideration in the above case, and was held by this court to be unconstitutional so far as the same applied to trains engaged in interstate commerce. This was a Sunday law, and it was a question whether the law should not be held to be valid as an exercise of its police power by the State, and on this ground, one of the judges filed a dissenting opinion, but the court, after a most careful review of the authorities, held that the law could not be sustained even on that ground. That question does not arise in this case. Section 1295 cannot possibly be defended as a police regulation. It affects neither the lives, health, happiness, morals, good order nor safety of the community. It merely undertakes to fix the extent of liability to be assumed by carriers who accept for transportation any article of commerce destined to a point beyond the terminus of their own line or route. In the course of the opinion, Judge Lewis says: "The power thus conferred, as the Supreme Court of the United States has repeatedly decided, is complete and

exclusive. * * * Any attempt, therefore, by a State to regulate foreign or interstate commerce, is the attempted exercise of a power which has been surrendered by the State, and granted exclusively to the National Government. It is an attempt to do that which Congress alone is authorized to do, and hence is a nullity. * * * Where the subject is national in its character, admitting of uniformity of regulation, such as the transportation and exchange of commodities between the States, Congress alone can act upon it. * * * Nor does it matter, in such a case that Congress has not acted, for it is now settled that the silence of Congress is not only not a concession that the powers reserved by the States may be exerted as if the specific power had been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the General Government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to affect that which would be incompatible with such intention."

11 It was admitted by the court below, in this case, that had Congress adopted a bill of lading differing from the requirements of section 1295, and a shipment had been made under the congressional bill of lading, then the petitioner could not have set up the requirements of section 1295 as a basis of recovery, that the law of Congress would control. How then could the court below fail to be convinced that the law of this State was invalid, when it had before it what was said by this court in the Norfolk and Western case (page 102)—viz: "Such a statute if passed by Congress so far as it concerns foreign and interstate commerce would be valid, not, however, as the exercise of po'ice power, but as a regulation of commerce. And the reason which would make such legislation valid as an act of Congress, makes it invalid as an act of a State legislature."

For the foregoing reasons your petitioner prays your honors for an appeal and supersedeas from and to the decree complained of, that said decree may be reversed and annulled, and that such order as may be proper may be entered by this court, and for such other relief as may be right and proper.

RICHMOND AND ALLEGHANY RAILROAD CO.,
By WM. J. ROBERTSON AND
HENRY TAYLOR, JR., *Of Counsel.*

We, Wm. J. Robertson and Henry Taylor, Jr., attorneys practicing in the supreme court of appeals of Virginia, do certify that in our opinion the decree of the circuit court of the city of Richmond complained of in the foregoing petition, should be reviewed by said court of appeals.

WM. J. ROBERTSON.
HENRY TAYLOR, JR.

Appeal allowed and supersedeas awarded. Bond required in the penalty of $500.

To the clerk of the supreme court of appeals at Richmond, Va.

VIRGINIA:

In the circuit court of the city of Richmond the following proceedings were had:

H. L. TERRELL and THOMAS S. BOCOCK, Trustees, Plaintiffs,
against
THE RICHMOND AND ALLEGHANY RAILROAD COMPANY *et als.*, Defendants,

and

HENRY M. ALEXANDER and HENRY K. ELLYSON, Trustees, Plaintiffs,
against
THE RICHMOND AND ALLEGHANY RAILROAD COMPANY *et als.*, Defendants.

These causes came on this day to be further heard on the papers formerly read, and on the motion of the R. A. Patterson Tobacco Company, to be allowed to file its petition, praying for damages upon a contract alleged in said petition to have been broken by the negligence of Decatur Axtell, the receiver in said cause, or his agents, on or about the 1st day of August, 1888. And the court, upon consideration, doth adjudge, order and decree that the Richmond and Alleghany Railway Company be and they are hereby required to show cause or or before the first day of the next term of this court why the said petition should not be filed.

12 And the court doth order that a copy of said petition be served upon said Richmond and Alleghany Railway Company within the next ten days.

And at another day—to wit: At a circuit court of the city of Richmond, held at the court-room thereof in said city, in building No. 1007, Main street, on Tuesday, February 14th, 1893.

This day these causes came on to be again heard on the papers formerly read, and upon the petition of the R. A. Patterson Tobacco Company, the bill of lading therewith filed, marked Exhibit "A," the answer of the Richmond and Alleghany Railroad Company, the general replication to said answer, and the following facts agreed to by counsel, and stated to the court:

That the bill of lading aforesaid is not signed by the shippers or their agents; that the tobacco in question was an interstate shipment; that the same was delivered by the Richmond and Alleghany Railroad Company to the next succeeding carrier, and was lost after the same had left the possession of the Richmond and Alleghany Railroad Company; that the sole question submitted to the court for decision was whether section 1295, Code of Virginia 1887, was in conflict with article I, section 8, clause 3, of the Constitution of the United States, it being agreed that if section 1295 was constitutional the Richmond and Alleghany Railroad Company was responsible to the petitioner for the loss of the tobacco, but that if section 1295 was in conflict with the aforesaid clause of the Consti-

tution of the United States, then, under the terms of the bill of lading filed with said petition, the Richmond and Alleghany Railroad Company was not responsible to said petitioner, and was argued by counsel.

On consideration whereof the court is of opinion that section 1295, Code of Virginia 1887, is not in conflict with article I, section 8, clause 3, of the Constitution of the United States, and doth therefore adjudge, order, and decree that the Richmond and Alleghany Railroad Company is liable to the R. A. Patterson Tobacco Company for the amount claimed by them in their petition aforesaid, with interest and cost as follows—to wit:

Principal amount as of August 1, 1888.....	$227 67
Interest on same to date, 4 yrs., 6 mos., 15 days.....	62 04
Costs for depositions.....	10 00
	$299 71

The court doth therefore adjudge, order, and decree that E. K. Leland, special commissioner in these causes, pay out of the fund in the First National Bank of Richmond, Virginia, to the credit of the court in these causes, to the R. A. Patterson Tobacco Company, or to Courtney & Patterson, their counsel, the sum of $299.71, in full satisfaction of the claim of said petitioners.

The following is a copy of the petition above referred to:

Petition.

Your petitioner, The R. A. Patterson Tobacco Company, a corporation duly chartered under the laws of Virginia, respectfully represents that it has a just and legal claim against the defendant Richmond & Alleghany Railroad Co. (or the assets of said railroad company remaining under control of the court in this cause), arising out of the following state of facts.

That on the 1st day of August, 1888, said Richmond & Alleghany Railroad Company, being a common carrier of goods and chattels for hire from the city of Richmond, Va., to Lynchburg and Clifton Forge, Va., and thence by connecting lines of road to various distant points, was employed by said petitioner to take care of and carry, and did then and there undertake and agree to take care of and carry a certain lot of plug chewing tobacco from said city of Richmond to Bayou Sara, La. That in pursuance of said undertaking, the said tobacco was delivered to said railroad company on the day above mentioned, under consignment to Mann & Levy, Bayou Sara, La., and marked accordingly.

13 That the said railroad company received said goods, and gave their receipt, commonly called a bill of lading, for same, a copy of which is herewith filed as Exhibit "A," to be read as a part of this petition: from which said exhibit will appear a particular description, by weight and marks, of the tobacco aforesaid.

Your petitioner further represents that the value of said consignment was about $230, as will be shown at the proper time.

And the petitioner charges that, although the said defendant railroad company received said goods for the purpose aforesaid, yet the said defendant, not regarding its duty in the premises, nor its promise and undertaking so made as aforesaid, hath not taken care of said goods, nor safely and securely carried or conveyed them from Richmond, Va., to Bayou Sara, La., as aforesaid, nor hath delivered the same for your petitioner at said last-mentioned place, according to its promise aforesaid, but, on the contrary, the said defendant railroad company so carelessly and negligently behaved and conducted itself with respect to the said goods, that by and through the mere carelessness, negligence, and improper conduct of the said defendant, and its servants, the said goods were entirely lost to this petitioner.

Your petitioner further represents that immediately upon default of delivery as aforesaid, petitioner endeavored in vain to obtain from said defendant company some information as to the fate of said goods; and petitioner has repeatedly made demand of satisfaction for the loss aforesaid, but so far from responding to the inquiries of this petitioner, or satisfying said demand for payment, the defendant railroad company has utterly ignored all such applications, and left this petitioner remediless save in this honorable court.

In tender consideration whereof, &c., your petitioner asks leave to file this, its petition, praying that the Richmond and Alleghany Railroad Company be made party defendant to this petition and required to answer the same, but answer under oath is hereby expressly waived; that inquiry be directed into the subject-matter of this petition, and the liability of said defendant company to your petitioner be ascertained and paid out of any funds or securities under control of the court in this cause, and that your petitioner may have all such other, further, and general relief as the nature of his case may require or to equity shall seem meet.

And your petitioner will ever pray, &c.

THE R. A. PATTERSON TOB. CO.,
By COUNSEL.

COURTNEY & PATTERSON,
For Petitioner.

The following is a copy of Exhibit "A" filed with the foregoing petition:

EXHIBIT "A."

Form 131.

Lawrence Myers and Decatur Axtell, receivers Richmond and Alleghany railroad.

Through Bill of Lading.

Rates from Richmond to New Orleans in cents per one hundred pounds.

Weights and classification subject to correction.

If 1st class, ——; if 2d class, ——; if 3d class, ——; if
14 4th class, ——; if 5th class, ——; if 6th class, ——; if 7th class, ——; if 8th class, ——; if 9th class, ——; if 10th class, ——; special per 70.

RICHMOND, *August 1st*, 1888.

Received by Richmond and Alleghany railroad of R. A. Patterson & Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown)—viz:

Marks and numbers.	Articles.	Weight, subject to correction.
M. & L., Bayou Sara, La.	2¼ boxes. 2 pkgs. 10¼ boxes. 3 " 15 caddies. M'f'd tobacco.	865

Charges advanced, $—. Released.

Consigned to Mann & Levy, at Bayou Sara, La., to be transported by the Richmond and Alleghany railroad to ——, and there to be delivered to connecting railroad or water line, and so on, by one connecting line to another, until they reach the station or wharf nearest to the ultimate destination. If their ultimate destination be beyond the point for which rates are named in the margin, they may, by the connecting carrier nearest to such ultimate destination, be delivered to any other carrier, to be transported to such ultimate point, and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee. Each carrier, subject to the limitations and exceptions contained in this contract, shal be bound to deliver said goods in the same order and condition as that in which it received them, and the ultimate carrier to deliver

them at its station or wharf to the consignee or his assigns, if called for by him or them, as in the contract provided, he or they paying freight and charges thereon, and average, if any.

It is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be determined by proper delivery of them to the next succeeding carrier.

The carrier shall have liberty to transfer the goods to and transport them by lighters, barges, or any other vessel than that named, and shall have liberty to tow, and assist vessels in any situation, and to sail with or without pilots.

15 No carrier or the property of any shall be liable for gold, silver, precious stones, or metals, jewelry, or treasure of any kind, bank notes, securities, silks, furs, laces, pictures, plate glass, china, or statuary, unless bills of lading are signed therefor, in which their nature and value are expressed, and extra freight expressed and paid for the assumption of extraordinary risk; or for any loss or damage arising from any of the following causes—viz., fire, from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or theives, acts of God, or of the country's enemies; riots, collissions, explosions, accidents to boilers or machinery, standing, straining, any accident on, or perils of the seas or other waters, or of stream or inland navigation; restraints of Government, legal process, claims of ownership by third parties, detention, deviation, or accidental delay; want of proper cooperage or mending, insufficiency of package in strength or otherwise, rust, dampness, loss in weight, leakage, breakage, sweat, blowing, bursting of casks or packages, from weakness or natural causes, evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay or exposure to weather, or for loss or damage of any kind on goods whose bulk or nature requires them to be carried on deck or on open cars, or for the condition of packages or any deficiency in the contents thereof, if receipted for by the consignees as in good order. All liability under this bill of lading shall be estimated on the basis of the actual market value of the goods at the place and time of shipment. Varnish, turpentine, camphene, burning fluids, acids, inflammable goods, or other dangerous articles may be transported, if the carrier chooses on deck or elsewhere, and they shall, in all cases, be at the owner's risk. If any such articles be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor. All articles named in this bill of lading are subject to charges for necessary cooperage and repair. No liability shall exist for wrong carriage or delivery of goods, marked with initials or imperfectly marked, unless name and address of consignee be given at time of shipment, such marking being agreed to be taken as proof of contributory negligence.

All claims for damages to goods must be made, and the nature and expense thereof fully disclosed in the presence of the agent of the company having the same then in custody, before they are removed from the station or wharf. Unless written demand for dam-

ages shall be made upon the company liable therefor, or upon the company which actually delivered the goods, within ten days after delivery, all claims for damages shall be taken to have been waived, and no suit shall thereafter be maintainable to recover the
16 same. No agent or employee shall have authority to waive such demand.

If a carrier shall become liable to pay anything on account of goods which have been insured, he shall, to the extent of such liability, have the right of the insured as against the insurer.

In case of the detention by quarantine, obliging a discharge of the articles named in this bill of lading, all risks and liability of the carrier and its property shall cease, and the obligations, under this bill of lading, be deemed to have been entirely fulfilled when the articles shall have been thus discharged, and all risks and expenses incurred thereafter shall be on account of the shipper, owner, or consignee.

The several carriers shall have a lien upon the goods specified in this bill of lading, for all arrearages of freight and charges due by the same owners or consignees of other goods.

In case of loss, detriment or damage to the goods, or delay in the transportation thereof, imposing any liability hereunder, the transportation company or carrier in whose actual custody they were at the time of such loss, damage, detriment, or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be *prima facie* evidence of the condition in which he received them, in a suit against any other carrier.

The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, and if not taken away within twenty-four hours after their arrival, may, at the option of the delivering company, be sent to a warehouse, or be permitted to lie where landed, all at the expense and risk of the shipper, owner, or consignee. If no address of a person at the ultimate point of delivery, immediately entitled to *to* such delivery, be disclosed by this bill of lading, the same must be furnished by the shipper, owner or consignee, in writing, to the terminal carrier before the time at which, in ordinary course of transportation, the goods can arrive at such point. A failure to do this or remove the goods within twenty-four hours after their arrival. shall, in case of any subsequent loss of or injury to the latter, be treated as conclusive proof of negligence on the part of shipper, owner, or consignee which contribute- to such loss or injury.

Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor without actual and affirmative proof thereof. The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to abide by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner,
17 and consignee. This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, and each of them is to be bound by and have the ben-

efit of all the provisions thereof as if signed by it, the shipper, owner, and consignee.

This bill of lading shall have the effect of a special contract, not liable to be modified by a receipt from or any act of an immediate carrier. In witness whereof, bills of lading of this tenor and date have been signed, one whereof being accomplished and others to stand void.

A. L. WILKINSON.

The following is a copy of the answer of the R. & A. R. R. Co.:

The answer of the Richmond and Alleghany Railroad Company to a petition filed in the above-entitled causes, by the R. A. Patterson Tobacco Company, on April 7, 1890, respectfully denies every material allegation contained in said petition, and especially does it deny that in August, 1888, this respondent was employed by petitioner, or did then and there undertake and agree to take care of and carry a lot of chewing tobacco from the city of Richmond to Bayou Sara, La., or that it gave any receipt or bill of lading for the same, or that the said respondent lost the same through the carelessness, negligence, and improper conduct either of itself or any of its servants or agents. Respondent says, that long before the time referred to in said petition, it had ceased to have control and possession of its railroad, or to have any agents or servants authorized to operate the same, or to give any receipt or bill of lading for goods to be transported, all the property of respondent having been taken out of — hands and placed in charge of a receiver by the circuit court of the city of Richmond, in June, 1883, and said receivership having lasted until May, 1889.

Respondent further says, however, that it is informed and believes and charges that the tobacco alleged in said petition to have been destroyed or lost by the negligence of respondent or its servants or agents, was, in fact, lost by the act of God—to wit, by the sinking of a steamer in a violent hurricane whilst it was in due course of transportation to its point of destination.

Respondent further says, that even if the statement contained in said petition were true, no liability would be incurred by respondent, for the following reasons—to wit: Respondent has been informed, and believes and charges, that the loss referred to occurred beyond the terminus of its line and upon a connecting line over which it had no authority or control.

And, having fully answered, respondent prays to be hence dismissed with costs.

18 The following is a copy of the facts agreed to by counsel:

This day these causes came on to be again heard on the papers formerly read and upon the petition of the R. A. Patterson Tobacco Company, the bill of lading therewith filed, marked Exhibit "A," the answer of the Richmond and Alleghany Railroad Company, the general replication to said answer, and the following facts agreed to by counsel, and stated to the court:

That the bill of lading aforesaid is not signed by the shippers, or their agent; that the tobacco in question was an interstate ship-

ment; that the same was delivered by the Richmond and Alleghany Railroad Company to the next succeeding carrier, and was lost after the same had left the possession of the Richmond and Alleghany Railroad Company; that the sole question submitted to the court for decision was whether section 1295, Code of Virginia, 1887, was in conflict with article I, section VIII, clause 3 of the Constitution of the United States, it being agreed that if said section 1295 was constitutional, the Richmond and Alleghany Railroad Company was responsible to the petitioner for the loss of the tobacco, but that if said section 1295 was in conflict with the aforesaid clause of the Constitution of the United States, then under the terms of the bill of lading filed with said petition, the Richmond and Alleghany Railroad Company was not responsible to said petitioner; and was argued by counsel.

On consideration whereof, the court is of opinion that section 1295, Code of Virginia, 1887, is not in conflict with article I, section VIII, clause 3, of the Constitution of the United States, and doth therefore adjudge, order, and decree that the Richmond and Alleghany Railroad Company is liable to the R. A. Patterson Tobacco Company for the amount claimed by them in their petition aforesaid, with interest and costs as follows—to wit:

Principal amount as of August 1, 1888	$227 67
Interest on same to date, 4 yrs., 6 mos., 15 days	62 04
Costs for depositions	10 00
	$299 71

The court doth therefore adjudge, order, and decree that E. R. Leland, special commissioner in these causes, pray out of the fund in the First National Bank of Richmond, Virginia, to the credit of the court in these causes, to the R. A. Patterson Tobacco Company, or to Courtney & Patterson, their counsel, the sum of $299.71, in full satisfaction of the claim of said petitioners.

19 *Notice of Appeal.*

To R. A. Patterson Tobacco Co.:

Take notice.—That I shall, on the 20th day of Feb'y, 1893, apply to the clerk of the circuit court of the city of Richmond for a transcript of so much of the record in Terrell & Bocock, trustees, *vs.* R. & A. R. R. Co., and Alexander & Ellyson, trustees, *vs.* Same, as may be necessary to the correct understanding of the decree of Feb'y 14th, 1893, in the matter of the petition of the R. A. Patterson Tobacco Co.

RICHMOND AND ALLEGHANY R. R. CO.,
By COUNSEL.

H. TAYLOR, JR.,
For R. & A. R. R. Co.

Feb'y 20th, '93.

We accept notice of the above notice.

COURTNEY & PATTERSON,
For R. A. Patterson Tobacco Co.

A true transcript of the record.
Teste:

ALFRED SHEILD, *Cl'k.*

Fee, $5.25."

And now, at this day, to wit:

At a supreme court of appeals, held in the State library building, in the city of Richmond, on Thursday, March 12th, 1896.

Came the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree. Therefore it is decreed and ordered that the same be affirmed, and that the appellant pay to the appellee damages according to
20 law, and also its costs by it about its defence herein expended.
Which is ordered to be certified to the said circuit court.

The following is a copy of the opinion of the supreme court of appeals of Virginia:

21

Opinion.

R. & A. R. R. Co. *et als.* *v.* R. A. Patterson Tobacco Co. } Opinion by Judge James Keith, P., Richmond, Va., March 12, 1896.

The Patterson Tobacco Company filed its petition in the chancery causes styled Terrell and Bocock, trustees, *v.* Richmond and Alleghany Railroad Company and others, and Alexander and Ellyson, trustees, *v.* Same, pending in the circuit court for the city of Richmond, from which it appears that on August 1, 1888, the tobacco company delivered to the receivers of the R. & A. R. R. Co., at Richmond, a lot of tobacco consigned to Mann & Levy, at Bayou Sara, La., to be transported in accordance with the bill of lading filed with their petition.

The bill of lading is in the usual form and acknowledges the receipt of the several boxes and packages shipped, their weight, and classification. Among its provisions it sets out that it "is mutually agreed that if the ultimate destination of the packages received be beyond the point for which rates are named in the margin, they may, by the connecting carrier nearest to such ultimate destination, be delivered to any other carrier to be transported to such ultimate point, and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee." * * * "It is mu-
22 tually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier."

From the agreed facts it appears "that the bill of lading is not

signed by the shippers or their agent; that the tobacco in question was an interstate shipment; that it was delivered by the R. & A. R. R. Co. to the next succeeding carrier and was lost after it had left the possession of the R. & A. R. R. Co.; that the sole question submitted to the court for decision was whether section 1295 of the Code was in conflict with article 1, section 8, clause 3, of the Constitution of the United States, it being agreed that if said section was constitutional the Richmond & Alleghany R. R. Co. was responsible to the petitioner for the loss of the tobacco, but if it was in conflict with the aforesaid clause of the Constitution, then under the terms of the bill of lading filed with the petition the railroad company was not responsible."

By its decree the circuit court held that section 1295 was not in conflict with the Constitution of the United States, and the prayer of the petition was granted and a decree entered in favor of the petitioner for the sum of $299.71; and thereupon the railroad company obtained an appeal and supersedeas from this court.

23 Section 1295, above referred to, is as follows: "When a common carrier accepts for transportation anything, to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand be made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge."

That Congress has, under the Constitution of the United States, the power to regulate commerce is of course uncontroverted; that this power is, when exercised, exclusive in its character, and that the omission on the part of Congress to exercise the power over commerce with which it is clothed is in those respects in which the subject is capable of being dealt with by general regulations equivalent to a declaration of the will of Congress that it shall remain free and uncontrolled are propositions which seem to be thoroughly settled by the decisions of the Supreme Court of the United States. We need, therefore, only to inquire whether the statute just quoted is a regulation of commerce. If it be, we must declare it unconstitutional as trenching upon a province beyond the domain of State authority and over which Congress is given exclusive jurisdiction. The Supreme Court has construed clause 3, section 8, of article 1 in many cases. It has held that the power to regulate com-

24 merce among the States embraces the power to regulate all the various agencies by which that commerce is conducted. From these decisions it may be said that State laws which undertake to enforce a tax upon interstate or foreign commerce in any form or any law of a State which imposes a burden or hindrance upon commerce, or which tends to embarrass commercial intercourse and transactions, or which under any disguise or in any

manner seeks to give the citizens of one State any advantage over the citizens of other States engaged in interstate commerce, are regulations of commerce repugnant to the Constitution and void; but that court, with its accustomed conservatism, content to watch over and guard our system of government as time and occasion may render its intervention necessary, has wisely refrained from all effort at generalization or any attempt at enumeration of subjects as being within or without the one jurisdiction or the other which will furnish a safe guide in determining cases which have not come under its criticism.

It is, indeed, somewhat difficult to classify the decided cases and from them deduce harmonious rules of interpretation. Having given them, however, diligent investigation and our best consideration, we find that there is no reported decision which can be held directly to control the case before us.

Now, it is entirely clear that if there were no such statute law as that embodied in section 1295, there would be no liability upon the appellant, for it appears from the agreed facts that, in accordance with the provisions of the bill of lading, the packages entrusted to its care were duly delivered to the next succeeding carrier, and then its liability under the bill of lading terminated. At the first blush it would seem that the statute did regulate and control the bill of lading, which is conceded to be one of the instrumentalities of commerce. Upon a closer inspection of it, however, it is apparent that the law is careful to avoid any interference with the utmost freedom in the making of contracts and does not in any way attempt to control the legal effect of the contract when made. It in effect establishes a rule of evidence.

25 The common-law measure of liability being considered onerous and oppressive, the carrier is permitted to stipulate with the shipper so as to limit his responsibility by the insertion of any just and reasonable ground of exemption. It has therefore come to pass that bills of lading, like policies of insurance, have been expanded into cumbrous documents, in which the liability of the carrier is hedged about by almost innumerable exceptions, conditions, and exemptions, to which no one ought to be bound until they have been brought to his knowledge and attention and have received his intelligent approval. The statute does not say a certain exception, condition, or stipulation shall be void though embraced in the contract between the shipper and the carrier, but it declares what shall be the implied liability upon the carrier who receives goods for shipment in the absence of a special contract; and, in order to protect shippers from imposition, further declares that the contract relied upon to reduce the measure of the implied liability must be in writing and signed by the shipper. For the protection of the insured it has been found necessary in this and other States to declare by statute that certain provisions in policies of insurance shall be void unless printed in type of a certain size, while the "statute of frauds" is, in some form, it is believed, a part of the jurisprudence of every State in the Union. The statute under consideration was doubtless conceived in a like spirit as a necessary

and salutary precaution and safeguard against the dangers to which experience had shown that shippers were exposed. Such contracts are not without precedent. There was such a contract signed by the shipper in Hart *v.* Penn. R. R. Co., 112 U. S., 331.

26 State laws have been upheld which declare "all contracts, receipts, rules, and regulations * * * void" which exempt a railroad company or other person from full liability as a common carrier. See Talbott *v.* Merchants' Dispatch Co., 41 Iowa, at page 249. It is true the constitutionality of the statute was not in terms passed upon, the case having been decided in favor of the contract upon the ground that it was made in Conn., but the court distinctly asserts the validity of the Iowa law, which had been upon the statute book for many years, and was expressly upheld in the case of McDaniel *v.* Chicago, &c., R. R. Co., 24 Iowa, 412, and a liability under it enforced, the contract of the parties being overridden by the law.

In Maryland a law which makes bills of lading in all respects negotiable was upheld, though no one need be told that it changed very materially the rights and liabilities of the parties and was attended with far more serious and important consequences to shippers, consignees, and carriers than a law which only declares how a contract shall be evidenced. See Tiedeman *v.* Knox, 53 Md , 613. In same connection see Shaw *v.* Merchants' Nat. Bank of St. Louis, 101 U. S., 557, where Mr. Justice Strong, delivering the opinion, discusses at great length the interpretation and effect of the statutes passed by the States of Missouri and Pennsylvania, and shows very satisfactorily that those acts did not make bills of lading in

27 all respects negotiable, while there is not one word to show that he at all questioned the powers of the States to do so, though a denial of the power would have gone to the very root of the subject under discussion.

So, too, statutes which render the principal responsible for the act of his agent in issuing bills of exchange have been upheld, and others of a like nature which need not be mentioned.

Viewed, therefore, as a law which levies no tax, prescribes no duty, imposes no burden upon and in no way interferes with or regulates commerce, and which in no manner diminishes the power to contract, but which merely requires certain contracts to be in writing and signed by the shipper, the party with respect to whom the duties and liabilities of the common carrier are by such special contracts to be limited, it seems to us that section 1295 of the Code, or rather the first branch thereof (the remainder of the section having no bearing upon the question before us), and which reads as follows: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent," is not in conflict with the Constitution of the United States.

As was said by Judge Lewis in Western Union Tel. Co. *v.* Tyler,

90 Va., at p. 300, where section 1292, which imposes a penalty upon telegraph companies for failure to deliver messages, was called in question as being a regulation of commerce, "If it can be said to affect commerce at all, it does so only remotely and incidentally."

28 Mr. Justice Matthews, in Smith *v.* Alabama, 124 U. S., 465, states the law with his usual force and accuracy as follows: "It is among the laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for the acts of nonfeasance or misfeasance committed within its limits. If he shall fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in Sherlock *v.* Alling, 93 U. S., 99. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards fore-

29 seen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish?"

* * *

"But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or individuals. In other words, if the law of the particular State does not govern that relation and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction, over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for

cases within the scope of its power, the rule of the State law, which, until displaced, covers the subject."

To the luminous exposition of the law contained in the above quotation we feel that we can add nothing. Therefore, without prolonging this discussion, we are, for the foregoing reasons, of opinion that section 1295 is a valid and constitutional law, and the decree of the circuit court is affirmed.

Certified copy.

GEO. K. TAYLOR, *C. C.*

30 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record in the cause lately pending in said court, in which The Richmond and Alleghany Railroad Company was appellant and The R. A. Patterson Tobacco Company was appellee.

In testimony whereof I hereto set my hand and annex the seal of said court this 30th day of April, 1896.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, James Keith, president of the supreme court of appeals of Virginia, do certify that George K. Taylor, who hath given the preceding certificate, is clerk of the said court, and that his said attestation is in due form.

Given under my hand this 30th day of April, 1896.

JAMES KEITH.

The fee of the clerk of the supreme court of appeals of Virginia for this transcript of the record is $10.00.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of Virginia, before you or *of* some of you, being the highest court of law or equity of the said State in which a decision could be had in a said suit between The R. A. Patterson Tobacco Company and The Richmond and Alleghany Railroad Company, H. L. Terrell, surviving trustee of himself and Thomas S. Bocock, deceased, trustees, and Henry M. Alexander, surviving trustee of himself and Henry K. Ellyson, deceased, trustees, wherein was drawn in question the

validity of a statute of said State of Virginia, on the ground of its being repugnant to the Constitution or laws of the United States, and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said Richmond and Alleghany Railroad Company, H. L. Terrell, surviving trustee of himself and Thomas S. Bocock, deceased, trustees, and Henry M. Alexander, surviving trustee of himself and Henry K. Ellyson, deceased, trustees, as by their complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and
32 according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed by—

JAMES KEITH,
President Supreme Court of Appeals, Virginia.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do certify that a copy of this writ is on file in my said office.

Given under my hand this 30th April, 1896.

GEO. K. TAYLOR, *C. C.*

33 [Endorsed:] Richmond and Alleghany Railroad Co. & others *v.* R. A. Patterson Tobacco Co. Writ of error.

34 The United States of America to the R. A. Patterson Tobacco Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of Virginia, wherein The Richmond and Alleghany Railroad Company, H. L. Terrell,

surviving trustee of himself and Thomas S. Bocock, deceased, trustees, and Henry M. Alexander, surviving trustee of himself and Henry K. Ellyson, deceased, trustees, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable president of the supreme court of appeals of Virginia this 27 day of April, 1896, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES KEITH,
President Supreme Ct. of Appeals of Virginia.

Legal service of the above notice is hereby acknowledged.

R. A. PATTERSON TOB'O CO.,
By COUNSEL.

A. W. PATTERSON,
For Appellee.

35 [Endorsed:] R. & A. R. R. Co. & others *v.* R. A. Patterson Tobacco Co. Citation.

36 Know all men by these presents that we, The Richmond and Alleghany Railroad Company, as principal, and Decatur Axtell, as surety, are held and firmly bound unto The R. A. Patterson Tobacco Company in the full and just sum of one thousand dollars ($1,000), to be paid to the said R. A. Patterson Tobacco Company, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents, the above-bound Decatur Axtell hereby waiving the benefit of his homestead exemption to this obligation.

Sealed with our seals and dated this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at the March term of the supreme court of appeals of Virginia, in a suit depending in said court between The R. A. Patterson Tobacco Company and The Richmond and Alleghany Railroad Company, H. L. Terrell, surviving trustee of himself and Thomas S. Bocock, deceased, trustee, and Henry M. Alexander, surviving trustee of himself and Henry K. Ellyson, deceased, trustees, a decree was rendered against the said parties defendant, and the said parties defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree aforesaid in the aforesaid suit, and citation directed to the said R. A.

37 Patterson Tobacco Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said Richmond and Alleghany Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if

it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

RICHMOND AND ALLEGHANY RAILROAD COMPANY,
By DECATUR AXTELL, *Receiver.* [SEAL.]
DECATUR AXTELL. [SEAL.]

Sealed and delivered in presence of—
A. J. T. TREVVETT.

Approved by—
JAMES KEITH,
President Supreme Court of Appeals of Virginia.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, A. J. T. Trevvett, a notary public in and for the city and State aforesaid, do hereby certify that this day personally appeared before me Decatur Axtell, who, being by me duly sworn, did depose and say that after the payment of all his just debts and liabilities
38 and those of which he is jointly bound with others and expects to have to pay he is worth not less than the said above-mentioned sum of one thousand dollars ($1,000).

Given under my hand this 27th day of April, 1896.

A. J. T. TREVVETT,
Notary Public.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the original bond, of which the foregoing is a true copy, is on file in my office.

Given under my hand this 30th day of April, 1896.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: Case No. 16,293. Virginia supreme court of appeals. Term No., 1003. The Richmond & Alleghany Railroad Company *et al.*, plaintiffs in error, *vs.* The R. A. Patterson Tobacco Company. Filed May 8, 1896.

No. 172.

Brief of Wickham for P.E.

FILED
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JAMES H. MCKENN

Supreme Court of the United States,

October Term, A. D., 1897.

Filed Dec 1, 1897.

No. 172.

THE RICHMOND & ALLEGHANY RAILROAD COMPANY, AND OTHERS, PLAINTIFFS IN ERROR,

vs.

R. A. PATTERSON TOBACCO COMPANY, DEFENDANT IN ERROR.

In error to the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR PLAINTIFFS IN ERROR.

H. T. WICKHAM,
HENRY TAYLOR, Jr.,
Counsel for Plaintiff in error.

RICHMOND:
TAYLOR & TAYLOR PRINTING CO.,
1897.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

RICHMOND & ALLEGHANY R. R. CO. ET ALS., Appellant.

vs.

R. A. PATTERSON TOBACCO CO., Appellee.

BRIEF FOR THE APPELLANT.

The facts in this case are brief and are as follows:

The Richmond and Alleghany Railroad Company, by proper proceedings had, in the Circuit Court of the city of Richmond, Va., was placed in the hands of receivers, who for some years operated the said road and under appropriate proceedings the property was sold and passed into the hands of other parties. The receivers were discharged and the case retained on the docket of the Circuit Court of the city of Richmond for the purpose of disposing of claims that might have arisen during the receivership.

Such a claim was presented by the R. A. Patterson Tobacco Company and its petition filed in the cause claiming

to be reimbursed for the loss of certain tobacco shipped from Richmond, Va., to Mann & Levy, at Bayou Sara, Louisiana, and alleged to have been lost through the negligence of the carrier (ms. pp. 12–13). With the petition was filed the bill of lading marked exhibit A. (ms. pp. 14–17). To this petition the Richmond and Alleghany Railroad Company answered, (ms. p. 17) and the cause coming on to be heard on the petition and the exhibit therewith filed, the answer of the Richmond and Alleghany Railroad Company and the statement of facts agreed, the decree complained of was entered by the Circuit Court of the city of Richmond (ms. p. 18).

From this decree an appeal was taken to the Supreme Court of Appeals of Virginia, which court rendered its decision on March 13, 1896, affirming the court below (ms. pp. 19–20), as per the opinion of the court, printed at mss. p. 21.

From these proceedings it appears that on August 1, 1888, the R. A. Patterson Tobacco Company delivered to the receivers of Richmond and Alleghany Railroad Company at Richmond, Virginia, a lot of tobacco consigned to Mann & Levy, at Bayou Sara, Louisiana, to be transported in accordance with the bill of lading filed with the petition of the R. A. Patterson Tobacco Company. This tobacco was lost after the same had passed out of the possession of the Richmond and Alleghany Railroad Company. The answer of the Richmond and Alleghany Railroad Company sets up among other defences "that even if the statement contained in said petition were true, no liability would be incurred by respondents for the following reason, to-wit: Respondent has been informed and believes and charges that the loss referred to occurred beyond the terminus of its line and upon a connecting line, over which it had no authority or control."

This matter came on to be heard upon the petition, the bill

of lading filed therewith, the answer of the Richmond and Alleghany Railroad Company, and the following facts agreed:

"That the bill of lading was not signed by the shippers or their agent, that the shipment was an inter-state one, and the tobacco was delivered by the R. & A. Railroad Company to the next succeeding carrier and was lost after the same had left the possession of the Richmond and Alleghany Railroad Company; that the sole question submitted to the court and passed on was whether section 1295, Code of Virginia, 1887, was in conflict with article I, section 8, clause 3, of the Constitution of the United States, it being admitted that if said section, 1295, was constitutional the defendant was liable; but if it was not constitutional, then under the contract of shipment the defendant was not responsible."

The bill of lading, amongst other things, provides: "Consigned to Mann & Levy, at Bayou Sara, La., to be transported by the Richmond and Alleghany railroad to —— and there to be delivered to connecting railroad or water line, and so on by one connecting line to another until they reach the station or wharf nearest to the ultimate destination, * * * it is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier * * * in case of loss, * * * imposing any liability hereunder the transportation company or carrier in whose actual custody they were at the time of such loss * * * shall alone be responsible therefor * * *. The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to abide by all its stipulations, exceptions and conditions, as fully as if they were all signed by such shipper, owner and consignee."

As appears from the agreed statement of facts this contract or bill of lading was not signed by the shipper and under

section 1295 of the Code of Virginia, the judge of the Circuit Court of the city of Richmond, held that the appellant was liable for the loss of the goods after the same had left its possession, because of the requirements of said section, which judgment of the said Circuit Court of the city of Richmond was affirmed by the Supreme Court of Appeals of Virginia, the court of last resort.

Assignment of Error.

The court will perceive from the foregoing statement of the case that the question involved is as to the constitutionality of Section 1295 of the Code of Virginia, 1887, which section is as follows :

Sec. 1295. *Liability of carrier for loss or injury to goods.* When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge.

The Supreme Court of Appeals of Virginia held that the said section was not in conflict with Article I, Section 8, Clause 3 of the Constitution of the United States, which is as follows :

"The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The constitutional question being clearly raised in the record and the decision of the highest court being in favor of the validity of the statute, this court is now asked to review and reverse said decision.

ARGUMENT.

Where the subject of a contract is the transportation of articles of commerce from one State to another, the sole and exclusive power to prescribe its terms is vested by the Constitution in Congress, and no power is left in the State by which it can make any regulation; and non-action on the part of Congress, where the subject is national in its character or admits of uniformity of regulation, means that there shall be no regulation by the State.

Gibbons vs. Ogden, 9 Wheaton, p. 1.
State Freight Tax Cases, 15 Wall., p. 232, see 279–280.
3. *Walton vs. State of Missouri*, 91 U. S., p. 275.
4. *Henderson vs. Mayor New York*, 92 U. S., p. 259, see 272–3.
Hall vs. DeCuir. 95 U. S., p. 485, see 490.
Mobile vs. Kimball, 102 U. S., p. 691.
Gloucester Ferry Co. vs. Penn, 114 U. S., p. 196, see 203–4.
Brown vs. Houston, 114 U. S., p. 622.
Walling vs. Michigan, 116, U. S., p. 446, see 455.
Bowman vs. Chicago etc. Railway Co., 125 U. S., p. 465.
Leisey vs. Hardin, 135 U. S., p. 100.
Norfolk, etc. Railroad Company vs. Penn, 136 U. S., p. 114.

From the opinion of the Supreme Court of Appeals of Virginia, which will be found in the record (ms. pp. 21 to 29), it will be seen that it is conceded that but for the statute in question there would be no liability upon the appellant, be-

cause in accordance with the contract made between the appellant and the appellee, the appellant had safely delivered the goods in question to the next succeeding carrier and by the contract the responsibility of the appellant for the safety of the goods thereupon terminated. It is also conceded that the subject matter to which the statute relates, viz.: The contract between the shipper and the carrier, is of such a nature that it is capable of being dealt with by general regulation and that therefore the power of Congress under the Constitution of the United States is exclusive, and it is further conceded that non-action by Congress in such a case is equivalent to a declaration of the will of Congress that the subject-matter should be free and uncontrolled by State regulation.

If then the statute in question does in any manner regulate commerce, it must be void as in conflict with the Constitution, but it is held by said court that the statute does not regulate or control the parties in the making of the contract and for that reason is not unconstitutional. It is said that "the law is careful to avoid any interference with the utmost freedom in the making of contracts and does not in any way attempt to control the legal effect of the contract when made." How can this be when in the same breath the court says that but for the statute there would be no liability on the part of the appellant? The carrier and shipper for their mutual advantage had seen fit to make the contract in the way it was made and the shipper had agreed that "the acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to abide by all its stipulations, exceptions and conditions as fully as if they were all signed by such shipper, owner and consignee," and yet in spite of this contract as thus made and because of the statute, an entirely different contract is enforced by the court. How then can it possibly be said that the statute leaves the parties free to make such

contract as they please and that it in no way controls the legal effect of the contract when made? If the statute does not in terms control the parties, the interpretation or construction of it by the Supreme Court of Appeals of Virginia gives it that effect. While the statute does not say that certain exceptions, conditions or stipulations shall be void, though embraced in the contract yet it does in effect say that the stipulation that the carrier shall not be liable beyond the terminus of his own line, though embraced in the contract as made shall be void unless the contract is made in writing and signed by the shipper, and it even goes further and says that though the contract be in writing and signed by the shipper, that stipulation shall be void unless in a reasonable time the carrier gives satisfactory proof to the consignor that the loss did not occur while the thing was in his charge. While the Supreme Court of Appeals of Virginia says that the statute does not regulate or control the contract and the parties while making it and that it does not control the legal effect of the contract when made, yet said court holds that the statute establishes a rule of evidence and that the legislature constitutionally may pass such a statute. It does not help the argument to call it a statute which establishes a rule of evidence because if the effect of a rule of evidence is to deprive the carrier and shipper of the right to be left free to make such contract as to them may seem best suited to their respective interests for an inter-state shipment, the statute is as much unconstitutional as if it had in terms provided that it was intended to regulate and control the contract and the parties when making it. The forbidden result cannot be accomplished by giving to the means employed an innocent name.

Statutes relating to insurance policies and the statutes of frauds, which exist in all of the States, are valid and constitutional because the power to legislate on such matters has

never been surrendered by the States, while the power to legislate on the subjects or instrumentalities of inter-state commerce has been surrendered by the States and when the subject is capable of being dealt with by general regulation the power in Congress is exclusive. It may be that the statutes of frauds or the laws relating to insurance policies incidentally affect commerce just as laws on almost any conceivable subject may and do, in that sense, affect commerce; but such laws are very different from a law which deals directly and only with a common carrier and the shipper when engaged in making their contract for an interstate shipment. There can be no shipment of goods without a contract. This contract may be implied, it may be verbal or it may be in writing, either signed by one or both parties or by neither. Congress has seen fit not to legislate on the subject of such contracts. This contract is an essential instrumentality of commerce, without which commerce cannot exist and it admits of and requires a general regulation applicable to the whole country, therefore the non-action by Congress means that the parties to this contract shall be free to make it in such form and with such provisions (not contrary to public policy) as they please, yet the statute in question imposes a liability or penalty on one of the parties, unless the contract is in writing and signed. How then can it be said that these parties are free to make such a contract as they may think best for their interests? A further reason given by the Supreme Court of Appeals of Virginia why the statute should be sustained is that "the statute under consideration was doubtless conceived in a like spirit as a necessary and salutary precaution and safeguard against the dangers to which experience had shown that shippers were exposed." If the statute neither interferes with the utmost freedom in making contracts nor controls the legal effects of the contract when made, how then does it provide necessary and salutary precautions and safeguards against the dan-

gers to which experience has shown that shippers were exposed when left free to make such contracts and in such form as may seem best to the respective interests of the parties to the contract? If experience has shown that shippers need to be provided with precautions and safeguards against dangers arising from being allowed to make their own contracts with carriers in such form as they may choose, then it is the province of Congress to act; it has the exclusive power. This may be a good reason for the passage of such a law by Congress, but can hardly be a good reason why this act of the State legislature is constitutional.

This shipment started from Richmond, Virginia and its final destination was Bayou Sara, a point in Louisiana. The route was through six separate States of the Union. Experience may have shown the six separate legislature of these States that it was necessary to provide in six separate and conflicting ways against what they may assume to be dangers to which shippers were exposed. Could a carrier subject to six separate and conflicting laws possibly conduct its business with any satisfaction to itself or its patrons under such circumstances as these? Either the consignor in Virginia or the consignee in Louisiana can sue for the loss of these goods. Virginia has seen fit to say to the carrier, you shall be liable unless you make your contract in a particular way. Louisiana may have seen fit to say to the carrier, you shall be liable unless you make your contract in a different way. Under such circumstances how could the rights of these parties to this contract be properly determined? It was the object of the framers of the Constitution to furnish a safeguard against such dangers as this, to which commerce would be exposed, and for this reason they placed this provision in the Constitution of the United States. When this court came to pass on this provision of the Constitution of the United States they hold this power exclusive of all State legislation except in those matters which were local in their

nature and which could be best controlled by local legislation varying to suit the interests of each case, e. g. harbors, pilotage, etc., and except as regards such matters as may properly come under the reserved police power of the State.

It is not contended that every State statute that relates to or affects bills of lading is unconstitutional. Statutes making bills of lading negotiable, *while they relate to and affect the contract after it is made*, do not relate to nor affect the parties in making the contract nor do they relate to or affect the contract as between the parties thereto, but they simply declare what shall be the effect when other parties than those to the contract undertake to deal with the the bill of lading. Such laws may or may not be constitutional, this question is not now and never has been before this court for decision, but they are in no sense similar to a law which attempts to control and regulate the shipper and carrier in making their contract of inter-state carriage, and which imposes a penalty if its requirements are not complied with. So far as we are advised the constitutionality of statutes making bills of lading negotiable has never been raised in this court. It was certainly not raised in *Shaw vs. Mer. Nat'l Bank of St. Louis*, 101. U. S., p. 557, and we do not understand that this court of its own motion raises and decides points not made in the record and pleading, unless it be some question going to the jurisdiction of this court. The constitutional question not having been raised or discussed it would have been strange indeed if Mr. Justice Strong had raised and passed on the question as it is suggested by the Supreme Court of Appeals of Virginia, he would have done, had this court not considered the laws of Missouri and Pennsylvania relating to bills of lading, involved in the Shaw case, constitutional. It is an unvarying rule that no objection to the constitutionality of a law will be considered by this court unless raised by the party affected and decided by the court below.

The Supreme Court of Appeals of Virginia further says that laws have been upheld which declare "all contracts, receipts, rules and regulations * * void" which exempt a railroad company or other person from full liability as a common carrier, citing for authority on this question, *Talbott vs. Merchants Dispatch Company*, 41 Iowa, p. 247; and *McDaniel* vs. *Chicago, etc. Railroad Company*, 24 Iowa p. 412.

Had the Iowa court made any such ruling it would certainly not be authority in this court, but in neither of these cases was any question raised as to the constitutionality of the Iowa statute. In both cases the only question passed on was whether the contract under consideration should be construed by the law of Iowa or by the law of Connecticut in the one case, and by the law of Illinois in the other. Surely these two cases cannot be considered authority for the constitutionality of the Iowa statute involved.

The case of *Smith vs. Alabama*, 124 U. S. p. 465, was a clear case of the exercise of the police power of the State of Alabama, the statute in question in that case only incidentally affecting commerce and the validity of the statute was upheld. The finding of the court at p. 482, being:

First: "That the statute of Alabama, the validity of which is under consideration, is not, construed in its own nature, a regulation of inter-state commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of persons and property; and thirdly, that so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally and remotely, and not so as to burden or impede them, and in the particulars in which it

touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

The Virginia statute on the contrary when considered in its own nature is a regulation of inter-state commerce. In *Almy vs. California*, 24 Howard, page 169, Chief Justice Taney, at pages 173–4, says: "A bill of lading or some written instrument of the same import is necessarily always associated with every shipment of articles." Indeed it may be said the contract of shipment absolutely controls and regulates all commerce, and the power which can control or regulate the contract of shipment controls commerce. In *Railroad Company vs. Railroad Commissioner of Tennessee*, 19 Federal Reporter, 679, Hammon, Judge, at page 710, says: "But when a plain and unmistakable case of direct action on the commerce itself is presented, as all regulations or restrictions on the contract of transportation must be, all that need be looked to is the character of the commerce so regulated, and if it be inter-state transportation, as defined in the cases cited, regulation or restriction by the State is void." The very essence of the matter is well expressed by Mr. Francis Cope Hartshorne in his work entitled "The Railroads and the Commerce Clause," when at page 87, he says: "But if it be essentially an attempt on the part of the State to deal with matters which are more properly the subject of *contract* between the carrier and the person employing him, then it is an attempt to restrict his freedom in making contracts, and must be void when the contract sought to be made is one in the course of inter-state transportation. * * * All rights, duties and liabilities which have their origin in a contract between the parties and have no connection with the good order, peace and safety of the community, but only with the convenience or

commercial advantage of the contracting parties, can only be modified or added to by the authority which has the exclusive jurisdiction of the subject matter of such contracts."

It is well settled that the State cannot directly regulate the compensation of the common carrier for inter-state business.

Wabash, &c., Railway Co. vs. Illinois, 118 U. S., p. 557 and many other cases.

Any State law which indirectly regulates the compensation of the carrier for inter-state business must also be invalid. The compensation or tariff charged, depends mainly on two things; first, the distance, and second the character of the goods carried. One of the considerations going to affect the character, as regards the freight charged, is the value of the goods and the amount of liability which will be imposed on the carrier if lost or destroyed, or in other words the freight is higher as the risk is greater. A statute which imposes on one carrier liability for the acts of some other carrier in the route to destination, when the first carrier has parted with the goods and lost all control over them, makes the risk of the shipment much greater and therefore enhances the cost of transportation, the effect being to accomplish indirectly what the State cannot do directly. But it may be said, if you have your contract signed, this result will be avoided. We reply that the shipper and the carrier must be left free, and if they deem it to their convenience and advantage not to make their contract in the way provided by the statute they should be allowed to do so, and if because of the statute, the contract they have made is not enforced then they are clearly controlled and regulated in an essential element of inter-state commerce by the statute. It is further said by the Supreme Court of Appeals of Virginia that such contracts, i. e.

contracts signed by the shipper, are not without precedent and that there was such a contract in *Hart vs. Pennsylvania Railroad Company*, 112 U. S., page 331. That case arose out of a shipment of live stock. Almost every shipment of live stock in the United States moves under a bill of lading signed by the shipper or his agent while goods rarely move under a bill of lading so signed. It would seem that if the bill of lading can be signed in the one case without imposing any burden on the business, it may also be signed in the other, but such is not the case and the universal manner in which the business is done shows that there must be some good reason for the difference and to require a change would be a burden to the business. All live-stock is loaded by the shipper or his agent and not by the carrier, and hence at the time of the delivery of the stock to the carrier the shipper or his agent is present and can conveniently sign the bill of lading, while in the case of goods the shipper is rarely, if ever, present when the goods are delivered to the carrier and receipted for. The shipper's driver in most cases can neither read nor write, and is not in any sense an agent, such as is contemplated in the statute. As the business would have to be conducted, if the terms of the statute are complied with, the carrier would refuse to receive the goods or issue a receipt or bill of lading for them until it was signed by the owner or his agent, appointed for that purpose. Hence in every shipment either the owner of some one appointed by him as agent, for the purpose of signing the bill of lading, must go to the depot of the carriar, no matter how distant, and be present and sign the bill of lading. Considering the great volume of commerce passing from State to State in this country, one sees at once that in the aggregate the requirement that necessitates such a thing as this becomes an intolerable restrain, nuisance and burden and should not be imposed without some necessity therefor, and if imposed at all should only be imposed by Congress which alone has

power to make uniform regulations applicable to the whole country.

Requiring a bill of lading to be signed, and prescribing a penalty if it is not, and affixing a further penalty even though it be signed, if the carrier does not give satisfactory proof to the shipper that the goods were not lost or damaged while in its possession, is surely more of a regulation of commerce than the following State laws, which have been held unconstitutional when applied to inter-state commerce.

In *Almy vs. State of California*, 24 Howard 169, this court held the statute of California unconstitutional which required a stamp to be affixed to every bill of lading. Commenting on this case in *Woodruff vs. Barham*, 8 Wallace 123, Mr. Justice Miller at pages 127–8 says that such a tax is a regulation of commerce and that the Almy case was well decided on this ground. If requiring a person to procure and use stamped paper for a bill of lading is a regulation of commerce, surely requiring a person to write out his contract of shipment and go possibly many miles to a depot and sign it, is also a regulation and much more of a burden than the California statute.

The State of Missouri passed the following act:

Sec. 1. No Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever; provided, that nothing in this section shall apply to any cattle which shall have been kept the entire previous winter in this State. Provided further, that when such cattle shall come across the line of this State loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation, shall be responsible for all damages which may

result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such route shall be *prima facie* evidence that such disease has been communicated by such transportation."

"Sec. 9. If any person or persons shall bring into this State any Texas, Mexican or Indian cattle, in violation of the first section of this act; he or they shall be liable in all cases for all damages sustained on acount of disease communicated by said cattle."

This statute came under review in *Railroad Co. vs. Husen* 95, U. S. 465 and it was held to be unconstitutional, the second proviso in the first section being held to impose burdens and liabilities. It will be observed that the railroad company was not prohibited from transporting cattle by this statute through the State of Missouri, but it was provided that if in so doing they communicated the Texas fever to the cattle along its route they should be liable in damages for the same, and the existence of such disease along its route should be *prima facie* evidence that such disease was communicated by such transportation. The principle involved in the Virginia statute is very similar, and it makes no difference whether the burden or liability be great or small, the State can impose none. The Virginia statute imposes a burden and liability upon the carrier if certain things are not done at the making of the contract, just as effectually as the Missouri statute imposed a burden or liability upon the carrier if certain results followed the doing of a particular thing.

The State of Missouri passed another statute, which was as follows:

Sec. 1. All railroad companies, private companies, or individuals owning or operating a railroad or railroads in the State of Missouri are required to furnish a sufficient number

of double-decked cars for the shipment of sheep, to supply the demand for such cars on their repective lines and to allow shippers to load both decks in said cars with sheep to the aggregate extent of 20,000 pounds, which cars so loaded shall be received and transported by such railroad companies or private companies or individuals as one car-load of stock, and it shall not be lawful for said railroad companies, private companies or individuals to charge or receive for the transportation of a double deck car of sheep more than the legal rate of freight allowed for the shipment of stock."

This statute came under review and was passed on in the case of *Stanley vs. Wabash, etc. Railroad Company.*, 100 Missouri, page 435, and was held to be unconstitutional as applied to inter-state shipments. A railroad car is an instrument of commerce, just as much as a bill of lading is an instrument of commerce. If the State of Missouri could not constitutionally regulate the instrument of commerce in the one case by prescribing its character, why can the State of Virginia constitutionally regulate the instrument of commerce in the other case by prescribing its character, and imposing a liability if it be not in a particular shape? The regulation and control of commerce attempted by the Missouri statute was not near so great as will be the regulation and control of commerce if the statute of Virginia is held constitutional. The Virginia statute deals with the subject which lies at the very foundation of all commerce and without which commerce cannot exist.

The courts generally in this country have held that where a carrier accepts for transportation, goods destined to a point beyond the terminus of his own line, he shall not be liable for the loss or damage occurring beyond such terminus. The English courts have held the reverse of this and out of this has grown what is known as the American rule and the English rule. This court has had this question before it and it holds to the American rule and discards the English rule.

See *Railroad Company vs. Manufacturing Company*, 16 Wall, 318. In this case at page 324, Mr. Justice Davis says: "It is the duty of the carrier in the absence of any special contract to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts of this country, although in England at the present time and in some of the States of the Union the disposition is to treat the obligations of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." This statement of the law has been approved by this court in subsequent decisions. See—

Railroad Company vs. Pratt, 22 Wall., 123;
Insurance Company vs. Railroad Company, 104 U. S., 146;
Myrick vs. Michigan, etc. Railroad Company, 107 U. S., 102.

And the same was the rule in Virginia prior to the passage of Section 1295 of the Code of 1887. See—

McConnell vs. Norfolk, etc. Railroad, 86 Va., 248.

Where on page 254, Fauntleroy, Judge says:

"The liability of the common carrier is restricted to its own route unless it contracts to carry goods to their ultimate point of destination and such contract is not established by proof that the carrier accepted the goods with knowledge of their destination and named a through rate for the same; and in the absence of a special contract to de-

liver the goods at a point beyond its line, the receiving carrier is not liable for a loss or damage occurring to the goods after their delivery to the connecting carrier."

Some few courts in this country hold the initial carrier liable for the acts of succeeding carriers, which rule this court considers injust and unreasonable and declares that "it is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject especially in this country." If it is unfortunate for the interests of commerce in this country that a few the courts of last resort should hold to this unjust and u sonable doctrine, still more unfortunate will it be for co nerce if the States of this Union shall be allowed by this court to regulate how, in what form or with what conditions and limitations the inter-state contract for carriage shall be made. There may be as many different and conflicting provisions as there are States, thus leading to an interminable confusion and embarrassment.

This court cannot control the Supreme Courts of the States unless a Federal question is involved, hence cannot remove the unfortunate effects on commerce due to conflicting State decisions on this subject, but when the legislature undertakes to adopt this unjust and unreasonable rule by statute and the State court changes its rule of decision in consequence of such legislation and holds the same to be constitutional, then this court has full power to prevent unjust and unreasonable legislation tending to produce a state of affairs unfortunate for the interests of commerce. This is a subject on which it is necessary that there should be one uniform rule for the whole country and that uniform rule can only be furnished by Congress, and where the matter is national and admits of or requires a uniform system of regulation, it is settled beyond dispute that the power of Congress is exclusive. Had Congress provided a uniform bill of lading for inter-state shipments which provided for

confining the liability to the line on which the loss occurred and did not require that the bill of lading should be signed by the shipper, then clearly the Virginia statute would be in conflict therewith and void and the reason which would make such legislation valid as an act of Congress makes it invalid as an act of a State Legislature. The contract of shipment is entire and if made in Virginia, valid laws of that State enter into and become a part thereof, binding on the other carriers forming links in the route, hence if this law is valid, we would have a law of Virginia which would control and regulate carriers in the most distant States. That such legislation is national in its character must be conceded and hence it follows that only that power authorized to act for the nation should be allowed to pass such laws.

The Court of Appeals of Virginia further says that section 1295 "in effect establishes a rule of evidence." The Supreme Court of Missouri said the same thing of a Missouri statute but with the curious result that they held a railroad company not liable, when, under the statute, if constitutional, it was clearly so.

In 1879 the State of Missouri passed a statute, now in the revised statutes, Sec. 944 which is as follows:

"Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company, issuing any such receipt or bill of lading, shall be entitled to recover, in a proper action, the amount of any loss, damage or injury

it may be required to pay to the owner of such property from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

This statute clearly provides that a railroad issuing a bill of lading for property which passes over other railroads en route to destination shall be liable for negligent loss of or injury to the property by such other carrier.

Its purpose was (as is clearly decided by Division No. 1 of the Supreme Court of Missouri, March 9, 1891, in the case of *Dimmett vs. Railway Company*, 103 Mo. 433, 15 S. W. 761), to establish the English rule in that State as contra-distinguished from the American rule, which rule is characterized by Mr. Justice Davis in the case of *Railroad Company vs. Manufacturing Company* above referred to as a "rule of liability."

This statute seems to have often been before the courts of Missouri for construction.

In the case of *Dimmitt vs. Railroad Company*, above referred to, notwithstanding the express terms of the statute they held the carrier when it received the property to be transported to a place beyond the terminus of its own line liable as such carrier to the place of destination *in the absence of special contract to carry only to the terminus of its own road*, holding that "a specific agreement that defendant (the carrier) was only liable to loss or damage occurring on its own line" was equivalent to a specific agreement that "the defendant only contracted to carry the property to the terminus of its own line;" they further held in that case that the bill of lading contained no express condition limiting the liability to the line of the carrier in whose possession the goods were when lost, notwithstanding that the bill of lading did provide that the initial carrier would carry to Omaha which was its terminus and there deliver to the next

carrier, it further appearing that the goods were lost by the negligence of the succeeding carrier. And the court further held that the enactment as thus construed becomes a rule of evidence by which to determine what the contract with the carrier is, in the absence of any specific one, and was violative of no constitutional right.

An examination of the language used in the statute will convince the court that the Missouri court placed a very violent construction upon the act, and it is evident that the purpose of this was to avoid running afoul of the federal constitution.

This pronouncement of the first division of the highest court was reviewed on the 7th of April, 1891, by the St. Louis Court of Appeals in the cases of *Drew etc. vs. O. & M.* 44 Mo. App. 416, and *Hist Publishing Company vs. Adams Express Company*, 44 Mo. App. 421, and in the Kansas City Court of Appeals on November 9, 1891, in the case of *Hill vs. Missouri Pacific*, 46 Mo. App. 517, the lower courts criticising delicately, but surrendering their own convictions before what they considered an authoritative exposition of the statute, although expressing doubt as to where the path they were then travelling would lead.

On December 22, 1891, Division No. 2 of the Supreme Court of Missouri considered the question in the case of *Nines vs. St. Louis etc. Railroad* 107, Mo. 475, 18 S. W. 25. In this case the bill of lading expressly provided that the receiving carrier should not be liable beyond its terminus, and the court sustained the contract as made *in the teeth of the statute* which did not make the liability dependent in any way upon the contract but only upon the receipt of the goods to be transported from one place to another within or without the State of Missouri, following the Dimmitt case in the forced construction of the statute in order to reach constitutional ground in their opinion for sustaining it.

On June 30, 1894, Division No. 2 of the Supreme Court of

Missouri again had the question up in the case of *McCann vs. Eddy*, 27 S. W. Rep., 541 (not reported in the Missouri reports) and by an opinion in which they all concurred it was held that the statute above copied did not prohibit a carrier from contracting with a shipper against liability beyond its own line; and that in making the carrier receiving the goods for shipment liable for connecting carrier's negligence, if construed to operate outside the State, said statute was an attempt to regulate inter-state commerce and unconstitutional. The *Dimitt* and *Nines* cases were reviewed by Judge Sherwood, who, in delivering the opinion, continued at page 542: "If the section under discussion is to be construed literally; if it is to be interpreted as casting on one railway company the burden of the negligence of another railway company, against whose negligence the company sued has explicitly contracted, as in the present instance, then I have no hesitation in saying I do not believe the Legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may see fit. This power of individuals or corporations to contract as they think best has been recently decided by this court to be placed beyond legislative interference by constitutional guaranties, both State and Federal, which uphold the right of 'due process of law,' and all that term implies. *State vs. Loomis*, 115 Mo. 307, 22 S. W., 350; see also *in re Jacobs*, 98 N. Y., 98; *Butcher's Union Cases*; 111 U. S., 746. * * * Moreover, if Section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of inter-state commerce, and therefore violative of Section 8 of Article I of the Federal Constitution. Any rule pertaining to the transportation of passengers or merchandise from one State to another is a regulation of inter-state commerce, and therefore, under the prohibitions of the Federal Constitution, a State is inhibited from making such regulations. * * *

In order to conspicuously show that the statute construed as plaintiffs desire, is plainly such a forbidden regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandise transferred to that State from this State, and at variance with Section 944 aforesaid. As is aptly elsewhere said 'commerce cannot flourish in the midst of such embarrassments.'"

In construing the bill of lading at page 542 of the report last above referred to, Judge Sherwood said: "In the case at bar, the instrument which is the basis of this action is to be construed as a whole. Construing it in this way it is easy to see that the liability apparently assumed by the first clause of the contract is expressly qualified and limited by the thirteenth specific agreement aforesaid, which in clear and unambigious terms confines the liability of the defendant company to its own line of road," which as above said had already been decided in the *Dimmitt Case* to be equivalent to a specific agreement that the defendant only contracted to carry the property to the terminus of its own line.

On December 10, 1895, however, the case of *McCann vs. Eddy* came up before the Supreme Court of Missouri in *banc.*, and a result contrary to the opinion of Division No. 2 as delivered by Judge Sherwood was reached, s c. 133 Mo. 159; 33 S. W. 71.

In passing upon the contract which already had been passed upon by Judge Sherwood, Macfarlane, J., says, "that the agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of the defendant to relieve it from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such qualifica-

tion of the contract, it can only be held to relieve it from its common law, liability of insurer. The ruling of the court in respect to giving and refusing the instructions mentioned was correct."

An examination of the opinion of the court will show that the case of *Nines vs. Railroad Company* is no where alluded to, although the bill of lading in the case of *McCann vs. Eddy* is substantially the same as in the case of *Nines vs. Railroad Company* and the court held that the railway company was liable disregarding absolutely the clause in the agreement which they held valid in the case of *Nines vs. Railroad Company* and the special contract upon which the transportation was had.

Upon reading the opinion in the case of *McCann vs. Eddy*, 133 Mo. 559, this court will see that the decision turned upon the construction given to the bill of lading, which construction it is respectfully submitted is incorrect. The bill of lading provided that the M. K. & T. Railway should carry from Stoutville, Mo., to Chicago, Ill., and expressly agreed that the railway company should be released from liability beyond its own line except to protect the through rate of freight named in the bill of lading. The court held that this was absolutely a contract to carry through to Chicago, disregarding the express conditions limiting its liability to its own line.

The question again came up before the Supreme Court of Missouri in *banc*, on May 4, 1897, in the case of *Miller Grain and Elevator Company vs. Union Pacific* 40 S. W. 894. In this case the court construed the Nebraska statute on the subject of connecting carriers saying. "We have given a similar construction to a statute of our own State whose provisions are in substance the same. *Dimmitt vs. Railroad Company*."

In the Miller case, notwithstanding that the bill of lading was substantially the same with the bill of lading construed by the court in the *Nines case* and with the bill of lading con-

strued by the court in the case of *McCann vs. Eddy*, the Missouri Supreme Court held that the contract of the Union Pacific was only to carry to its terminus and there deliver to the next connecting carrier, hence it was not liable, notwithstanding the plain language of the statute copied above, Macfarlane, Judge, saying, "we are unable to see * * * that the construction we give this statute makes it repugnant to that provision of the constitution of the United States which gives to Congress alone the power to regulate commerce among the States. The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States subject to congressional regulations. The statute merely prohibits a carrier, who, by contract, undertakes to transport property to a point beyond its own route from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other States."

It will thus be seen that the Supreme Court of Missouri in construing a statute somewhat analagous to the one in the case at bar has occupied conflicting positions and has manifestly forced the construction of the statute from the plain meaning of the words used in order to find some ground on which it could claim it to be constitutional, and its adjudications therefore can hardly be even persuasive here.

In the case at bar, the Court of Appeals of Virginia did not so construe the Virginia statute as to allow the carrier and shipper to contract as they might see fit, notwithstanding the statute, and the effect of the decision of the Supreme Court of Appeals of Virginia is that the shipper and carrier cannot mutually agree to dispense with the requirements of

the statute because the bill of lading in this case provides that "the acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to abide by all its stipulations, exceptions and conditions as fully as if they were all signed by such shipper, owner and consignee." Surely the decision of the Court of Appeals of Virginia that in consequence of this statute the parties could not agree to waive the requirements thereof, makes this a statute which absolutely controls, regulates and binds the parties in making their contract of shipment.

The section of the Virginia code which we are considering here, to-wit: section 1295, goes much further than the Missouri statute as construed by the Missouri court in the last ruling upon the subject. The Missouri statute, says its Supreme Court, merely prohibits the carrier which has contracted to transport property to a point beyond its own line, from relieving itself from the liability as common carrier throughout, to destination. In Virginia the statute undertakes to prescribe what the contract shall be unless there is an express agreement in writing and signed. It is not the exercise of the police power; it does not seek to regulate the duties, rights and liabilities of citizens, generally; it does not provide for the safety of persons and property; it does not declare what laws shall govern the dealing with a contract of carriage after it is made; it does not deal with a subject which is local in its nature and can best be dealt with by laws also local and suited to the peculiar circumstances of the locality; it is not a statutory enactment of a duty which already exists at common law; it is a statute which compels the shipper and carrier when engaged in agreeing between themselves as to the terms and conditions which they think will best promote their mutual interests, to make their contract in a particular manner, or else impose a penalty upon one of the parties. In its practical effect it is a regulation

of commerce, and when its effect extends beyond the State line it is regulative of commerce between the States.

Webster defines the words "to regulate" as follows: "to adjust by rule, method or established mode—to subject to governing principles or laws."

Section 1295 of the Code of Virginia is as follows:

"Sec. 1295. *Liability of carrier for loss or injury to goods.* When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent, and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge."

The compensation for carriage, or freight rate, depends and is based upon the cost of transportation, risk involved and service rendered. A common carrier is an insurer, and in fixing the amount of his compensation the insurance feature of the contract is a dominant element. Read section 1,295 as put into practical operation, and we find that the Court of Appeals construes it as if its phraseology were as follows:

When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, (that is to say, for the same rate per ton per mile, or amount of compensation, said carrier shall carry and insure such thing against loss or damage resulting from whatever

cause save inherent defect, act of God, or of the public enemy to his own terminus and shall also insure such thing against loss or damage resulting from whatever cause save inherent defect, act of God, or of the public enemy while in the custody of any other carrier between said terminus and destination, including, however, the perils of rivers and seas where such carriage is by water) unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be, such contract in writing, if such thing be lost or injured such common carrier shall himself be liable therefor, unless within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge.

This is the practical effect and true meaning of this statute, and it is a self-evident proposition that it is a regulation of commerce.

Now apply this statute to the case at bar and we find that the law would read as follows :

When the Richmond and Alleghany Railroad Company, which is a corporation extending from Richmond to Clifton Forge, accepts for transportation Patterson's tobacco directed to Bayou Sara, Louisiana, said Richmond and Alleghany Railroad Company shall be deemed thereby to assume an obligation for the safe carriage of said tobacco to said Bayou Sara, Louisiana, (that is to say, for its mileage proportion of a special rate of seventy cents per one hundred pounds made between Richmond and New Orleans the said Richmond and Alleghany Railroad Company shall carry said tobacco and insure the same as aforesaid to its own terminus, i. e., Clifton Forge, and shall also insure, as aforesaid, said tobacco against the risk of loss or injury while in the custody

of any other carrier including, however, perils of rivers and seas while said tobacco is being transported over such connecting lines as are by water) unless at the time of such acceptance said Richmond and Alleghany Railroad Company be released or exempted from such liability by contract in writing known as a bill of lading signed by Patterson or his agent; and, although there be such contract in writing or bill of lading, if such tobacco be lost or injured the said Richmond and Alleghany Railroad Company shall itself be liable therefor, unless within a reasonable time after demand made said Richmond and Alleghany Railroad Company shall give satisfactory proof to said Patterson that the loss of or injury to said tobacco did not occur while the same was in the charge of the said Richmond and Alleghany Railroad Company.

And to still further demonstrate the extreme conclusion to which this statute leads if held constitutional, let us apply it to a shipment to Liverpool with the rates that actually prevail to-day, bearing in mind that the present through rate for transporting tobacco of the actual market value of $40 per one hundred pounds from Richmond, Va., to Liverpool, Eng., is 28 cents; that the railroad proportion of that rate is 3 cents per 100 pounds from Richmond to Newport News, the seaboard; that the ocean rate from Newport News to Liverpool is 25 cents per 100 pounds, and that the minimum marine insurance is now three-tenths of one per cent.

Now, with this explanation, we find that the statute as practically applied to-day would result as follows:

When the common carrier, which is a corporation operating a line of railway extending from Richmond to the seaport, Newport News, Va., accepts from the R. A. Patterson Tobacco Company for transportation, tobacco directed to Liverpool, England, said common carrier shall

be deemed thereby to assume an obligation for the safe carriage of said tobacco to said Liverpool, England (that is to say, for its proportion of 3 cents per 100 pounds out of the rate of 28 cents per 100 pounds made between Richmond, Va., and Liverpool, Eng., the said common carrier shall carry said tobacco and insure the same as aforesaid to its own terminus, *i. e.*, Newport News, and shall also insure as aforesaid said tobacco at a cost to it of three-tenths of one per cent. of the value of said tobacco against risk of loss or injury while in the custody of the connecting steamship company, including perils of the seas, while the said tobacco is being transported by such connecting steamship company between said terminus and said destination) unless at the time of such acceptance such common carrier be released or exempted from such liability by contract in writing, known as a bill of lading, signed by said R. A. Patterson Tobacco Company or its agent; and, although there be such contract or bill of lading, if such tobacco be lost or injured, the said common carrier shall itself be liable therefor, unless within a reasonable time after demand made said carrier shall give satisfactory proof to said R. A. Patterson Tobacco Company that said loss or injury did not occur while said tobacco was in its charge.

The effect of this statute upon the through rate would be, if constitutional, to impose upon the carrier the duty of paying three-tenths of one per cent of the money value of the article carried for which it only got at the rate of three cents per hundred weight to transport and insure to its terminus. The ocean rates are to a great extent fluctuating quantities, depending upon the demand and offers made at ports other than Newport News. In other words the port of Newport News in order to secure bottoms must offer to vessel carriers rates of freight as remunerative as Baltimore, Philadelphia or New York, otherwise the vessels

will secure cargoes at ports other than Newport News. The locality of Richmond in order to get into the Liverpool market must place its tobacco in competition with shippers from other ports. The rate is made with the knowledge on the part of the shipper and carrier that the marine risk is not included. We venture to state that there is not a single shipment that does not go under a marine policy, taken out by the shipper. Under such circumstances the effect of the opinion of the Court of Appeals of Virginia, holding said statute constitutional, is that notwithstanding the parties made their contract with the knowledge that the marine risk is not incurred yet by this statute such risk is imposed in addition to the service of carriage, for a total compensation of 3 cents per hundred weight — a risk that skilled experts in the business estimate at three-tenths of one per cent of the money value, and will not take for less.

Applying this last illustration to a shipment of 1,000 pounds of Patterson's tobacco which is worth $400, we find the proportion of the rail carrier to be 30 cents—the proportion of the vessel carrier is $2.50, and the marine insurance three-tenths of 1 per cent of $400, or $1.33. In other words for 30 cents the rail carrier is required by the statute to assume an obligation for the safe carriage from Newport News to Liverpool, which skilled experts in the business, estimate at $1.33, and will not do for less.

If it be said that the carrier can avoid this risk by simply having its bills of lading signed by the shipper, we reply that the universal custom in America is that such bills are not, and as heretofore shown, cannot be conveniently signed; and that the statute is still obnoxious to the charge that it is a regulation of commerce because it provides in effect that if the bill of lading is signed the rate may be one thing, and if it is not signed you cannot transact the business at all, because with the present narrow margin which results from competition from the out ports, no carrier, as explained above,

could do business on the basis of three cents per hundred pounds, when the cost of giving the insurance imposed, is three-tenths of one per cent of the money value of the article carried.

The commerce therefore between the State of Virginia and foreign nations, and among the several States of this union, is in fact, as the foregoing illustrations show, made subject to the Virginia Statute, section 1295; it is a regulation of such commerce, and hence is in conflict with the Federal constitution and void.

A consideration of the foregoing illustrations, taken from what would be the practical application of this statute shows that the contention that this statute is necessary "to protect shippers from imposition," and hence so salutory as to incline the court in its favor and to maintain its constitutionality if possible to do so, is not well founded.

It is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia (record, m. p. 19–20) should be reversed.

H. T. WICKHAM,
HENRY TAYLOR, JR.
Counsel for Plaintiff in Error.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1897.

RICHMOND AND ALLEGHANY RAILROAD COMPANY ET ALS., APPELLANT,

vs.

R. A. PATTERSON TOBACCO COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

The only provision of the Virginia statute (Code 1887, sec. 1295,) which this court is now called upon to construe reads as follows:

"When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released from such liability by contract in writing signed by the owner or his agent."

Is this act a regulation of commerce in the sense intended by the Federal Constitution, Article I, Section 8, Clause 3,

and void because repugnant to that instrument, which vests in the Congress exclusive power to "regulate commerce with foreign nations and among the several States"?

The State court upheld the validity of said provision, and we submit that its decision was plainly right.

For an affirmance of the decree below we might rely with confidence solely upon the able opinion rendered by the Supreme Court of Appeals of Virginia, through its president, Judge Keith; but seeing that counsel for the appellant have gone outside the record for fresh ammunition in making their attack upon this opinion, we shall have to submit something by way of reply.

Much that is said by opposing counsel has never been denied. Indeed, the opinion of the lower court distinctly admits certain legal propositions which counsel for the appellant take considerable pains to support by the citation of numerous authorities. So we shall not concern ourselves about combatting the statement that "where the subject of a contract is the transportation of the articles of commerce from one State to another, the sole and exclusive power to prescribe its terms is vested by the Constitution in Congress," &c. The radical vice of the argument for the appellant consists in a confusion in the mind of counsel between the "*contract*" and the "*terms of the contract*," on one hand, and the *form or evidence of the contract*, on the other hand. Keeping this distinction clearly before us, we submit that every constitutional difficulty suggested against the statute in question vanishes into thin air.

The subjects upon which a State may legislate touching commerce are of three kinds, viz: (1.) Subjects that are in their nature local, such as dams, bridges, ferries and pilots. (2.) Subjects that are embraced in the police power of the State, such as relate to the safety, comfort and well-being of

society. (3.) Under its general powers of legislation, a State may enact laws that *incidentally* affect commerce, but not purposely or directly.

And it is obviously by virtue of this last power that the States have claimed and been accorded the right to prescribe certain rules governing bills of lading and the like.

In the case of *Sherlock* vs. *Alling*, 93 U. S., 99, Mr. Justice Field says at page 103:

"It is true that the commercial power conferred by the Constitution (on Congress) is without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-state commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt with the instruments of that commerce. Whatever therefore Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water or engaged in commerce, foreign or inter-state, or in any other pursuit."

Now it cannot be pretended, in the case at bar, that the Virginia statute "is directed against commerce or any of its regulations." On the contrary, it relates solely to "the rights, duties and liabilities of citizens." It imposes no burden upon commerce, nor interferes in any way with its freedom. And as Congress has not undertaken to deal with this matter, the State has full power to act.

"In pursuance of their general authority over internal concerns, the States may pass laws incidentally affecting inter-state commerce, provided such laws do not discriminate against such commerce, and are not inconsistent with acts of Congress. This power of the States is absolutely essential to the existence of a proper measure of local self-government." 11 Am. and Eng. Enc. Law, p. 555–6.

Counsel for appellant contend that because bills of lading are an essential instrument of commerce, any State law whatever touching these contracts is necessarily a regulation of them (and consequently of commerce) in the consti. tutional sense, and therefore void under the commerce clause of our Federal Constitution.

This is simply begging the question. As was said by Mr. Justice Strong in the *State Tax on Railway Gross Receipts*, 82 U. S. 293:

"It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution."

And in *Munn* vs. *Illinois*, 94 U. S. 135, this court referring to the case just cited, and considering the question of warehouses as necessary instruments of commerce, says:

"They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction."

Counsel for the appellant undertake to argue from a definition of the word "regulate," as found in the dictionaries, that the statute under examination is unconstitutional "because an admitted regulation of inter-state commerce." We submit that it is hardly necessary at this late day to consult a lexicon for the constitutional meaning of this term. This court has repeatedly given to it a judicial interpretation. "To regulate commerce is to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited." (*Wilton* vs. *State of Missouri*, 92 U. S. 280–1.

In *Sherlock* vs. *Alling*, *supra*, this court even more explicitly defines the term in question. At page 102 Mr. Justice Field, referring to the decisions cited by counsel to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States, says:

"The legislation adjudged invalid (in these cases) *imposed a tax* upon some instrument or subject of commerce, or *exacted a license fee* from parties engaged in commercial pursuits or *created an impediment* to the free navigation of some public waters, or *prescribed conditions* in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases *the legislation condemned operated directly upon commerce*, either by way of *tax* upon its business, *license* upon its pursuit in particular channels, or *conditions* for carrying it on."

(See also *Gloucester Ferry Company* vs. *Pennsylvania*, 114 U. S. 203–4; *Kidd* vs. *Pearson*, 128 U. S. 23.)

In the case of *Postal Telegraph Company* vs. *Adams*, 155 U. S., 696, it is held that taxing the franchise or privilege of being a corporation, whether domestic or foreign, was

within the power of State legislation, notwithstanding the imposition of such taxes *incidentally* affected the occupation of the defendant company.

We submit that the statute is in no legal sense a burden upon or a regulation of commerce. That it does not conflict with any act of Congress and is not contrary to any intention of Congress to be presumed by its silence. That it is simply an amendment or enlargement of the local law, which is subject to be modified by the Legislature, and which simply regulates the relative rights and duties of carriers and persons doing business with them in this State. That if the law of this State does not govern that relation and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or it is held by implication to have supplied it; that the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts the rule of the State law, which until displaced covers the subject; that while it is competent for Congress to prescribe specific regulations touching foreign and interstate commerce, which regulations would supersede all conflicting local law which even incidentally affects such commerce, yet until such action is taken by Congress, the State statute must prevail.

Smith vs. *Alabama*, 124 U. S. 465.
Telegraph Company vs. *Tyler*, 90 Va. 300.

In *Smith* vs. *Alabama*, the statute assailed was one requiring railroad engineers in the State to be examined and licensed by a board appointed for the purpose. The plaintiff in error was an engineer engaged in inter-state commerce, and failing to undergo the examination or procure his license from said board, he was committed to answer an indictment for that offense. The case came up on a writ of *habeas*

corpus to test the constitutionality of said statute and was argued with great ability by counsel for plaintiff in error, who made every point and cited all the decisions of the Supreme Court now relied on by the appellant here. He contended that no State has the power to pass a law affecting inter-state commerce where its regulations require a uniform rule, or where the subject is national and should admit of but one form or plan of regulation; that the transportation of passengers and freight from one State to another is inter-state commerce; that the plaintiff in error, while operating as an engineer engaged in the business of inter-state commerce is as much an instrument of such commerce as the locomotive or cars in which the merchandise or passengers are transported; that to subject him, under the facts of the case, to examination and license and the payment of a fee before he is allowed to engage in the business of inter-state commerce, is not regulation, local or limited, in its nature, but one of general application, and that if the State of Alabama could impose such a system of regulation upon inter-state commerce, then every State in the Union could likewise devise and impose an independent system in accordance with its own policy and requirement; it might so happen that each State would have a different system of laws prescribing the qualifications and competency of a locomotive engineer, who might thus be compelled to get forty different licenses and submit to forty different examinations.

This was a much stronger plea than counsel can urge in the case at bar, because here no such confusion or inconvenience arising from conflicting State statutes is possible, as we shall presently show.

But it was further argued that Congress had itself legislated upon the whole subject of inter-state commerce carried on by the railroads of this country; that no provision is made in the Federal statute for the examination and license of locomotive engineers engaged in inter-state commerce;

and that this court had held that the non-exercise of the power in respect to the regulation of commerce between the States is equivalent to a declaration that such commerce shall be free and untrammeled.

And yet this court, Mr. Justice Matthews delivering the opinion, rejected all these considerations and upheld the statute in question as being properly within the reserved power of the States to enact. At page 480 he says, "the provisions on the subject contained in the statute of Alabama under consideration are not regulations of inter-state commerce. *It is a misnomer to call them such.*" And again he says, "no objection to the statute, as *an impediment* to the free transaction of commerce among the States, can be found in any of its special provisions." (p. 480.)

In *Sherlock* vs. *Alling*, *supra*, Mr. Justice Field says, at page 103.

"General legislation of this kind, prescribing the liabilities and duties of a citizen of a State, without discrimination as to pursuit or calling, is not open to any valid objections because it may affect persons engaged in foreign or inter-state commeree. *Objection might, with equal propriety, be urged against legislaion prescribing the form in which contracts shall be authenticated, because applicable to the contracts of persons engaged in such commerce.*"

This language is singularly relevant to the statute under examination, which only undertakes to "*prescribe the form in which contracts shall be authenticated*," without attempting in any way to regulate what the contract shall be.

The Virginia statute was not passed without due consideration. It was first brought into our Code by the revisers of 1887. Prior to that time a common carrier's liability for safe transportation of merchandise was limited to its own road.

McConnell vs. *Norfolk and Western Railroad Company*, 86 Va., 248.

The rule was different in many other States where the English doctrine obtained, viz.: That the initial carrier was responsible throughout the entire route, whether over its own or connecting lines; and it was the purpose of our Legislature in adopting the new Code to substitute the English for the so-called American rule in this State. (See Judge Burks' address before the Virginia State Bar Association, Vol. IV. Reports, page 142.) Judge Burks shows, by his reference to 72 Am. Dec., 230, that the revisers had before them in considering this change the statutes of New York and Missouri touching the same subject. As appears in the brief of counsel for appellant, the Missouri statute having several times come before the highest court of that State for judicial construction, its validity has been sustained. A comparison of the two statutes will show that there is a marked difference between section 244 of the Revised Statutes of Missouri and section 1295 of the Code of Virginia. The former statute provides that the common carrier issuing a bill of lading for goods received shall in any event be liable for any loss, damage or injury to such property caused by its own negligence or that of any connecting carrier to which such property may be delivered. The Virginia statute, on the other hand, only provides that the initial carrier in such case *shall be deemed to assume an obligation* for safe carriage throughout the route, "*unless*, at the time of such acceptance, *said carrier be released* or exempted from such liability by contract in writing signed by the owner or his agent." Even if the Missouri statute could by fair construction be held to prescribe a "rule of liability," the Virginia statute is most clearly and unquestionably in its purpose and effect nothing more nor less than a "rule of evidence." The latter statute carefully obviates the very difficulties which have been suggested in connection with the Missouri law in question. We insist that the statute of Virginia leaves the parties perfectly free to make any agreement they may see fit touching their mutual rights and lia-

bilities; but if that agreement is not *evidenced in a certain way*, the carrier "shall be deemed to assume a obligation," &c.

3d Minor's Inst., page 258.
Pennsylvania Railway Company vs. *McCann*, 42 N. E. Rep., 768.

The question is, *What was the contract?* A bill of lading was originally nothing but a receipt for the goods, with the carrier's undertaking, either express or implied, to deliver them as directed. When conditions and stipulations are added affecting the shipper, it assumes the form of a contract *inter partes*, but is not such unless and until adopted by the party to be bound. The question recurs, has the consignor ever agreed to these stipulations? Ordinarily the acceptance of such a paper would be *prima facie* evidence of such agreement, though the shipper never read or had an opportunity of reading a word that was in it. Now, the Legislature, in its wisdom, says: The best evidence that the shipper entered into the release contract shall be his signature or that of his agent thereto, and in the absence of such signature, it *shall be presumed* that the initial carrier undertook to convey the property safely to its destination. If the consignor did make such release contract, he must be bound by it. The statute does not undertake to interfere with private contracts. But if he did not *execute the paper*, then the carrier shall be deemed to have assumed liability for the entire route. In other words, the burden of proof is shifted.

It cannot be denied that, independently of any statute, the courts had a right to hold, and did hold in many States, the initial carrier liable beyond the terminus of his own line. Can it be said, then, that the Legislature is powerless to enact a declaratory statute—that a judge can rightly pronounce that to be the law which, if enunciated by the law-making body, would be unconstitutional?

As was said by Judge Lewis in a recent case (*Telegraph Company* vs. *Tyler*, 90 Va. 300):

"That it would be competent, moreover, for the State to afford redress through her courts according to the common law for the negligent failure of a telegraph company to deliver a dispatch sent from another State is unquestionable; and if this may be done it is equally competent for the State to seek by legislation in advance to prevent such violation of duty. What the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent."

See also *Nashville R. R. Co.* vs *Alabama*, 128 U. S., 96; *Smith* vs. *Alabama*, 124 U. S., 465.

Mr. Chief Justice Waite, in *Munn* vs *Illinois*, *supra*, says at page 134:

"A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In the case of *The Henry B. Hyde*, 82 Fed. Rep., 681, Judge De Haven expressly recognizes the right of a State to enact a statute in respect to the execution of bills of lading for inter-state commerce. At page 682 he uses this language:

"In my opinion, the rule which governs the point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract *in the absence of any statute to the contrary*, may be contained in the bill of lading signed by the

carrier alone, and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the absence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. * * * It follows from what has been said that the stipulations stamped upon the face of the bills of lading under which the goods of the libellants were shipped are to be treated as parts of such bills of lading, and binding upon the libellants, unless this case is governed by Section 2176 of the Civil Code of this State (California), which declares in substance that, with the exception of certain stipulations not involved here, the acceptance by the shipper of a bill of lading or written contract for carriage of his goods containing modifications of the general liability of the carrier *is not binding upon the shipper unless signed by him.*"

In this case goods had been shipped from the port of New York to the city of San Francisco, and being damaged *en route* a suit was brought in California for the loss sustained. The court seems to have entertained no doubt about the validity of the California statute similar to that of Virginia, but held that it had no application to the case under trial as the law of New York, or *lex loci contractus*, governed the parties in the interpretation of their contract.

In the light of this decision it appears that there is nothing in the objection made by opposing counsel that under our Virginia statute "the contract of shipment is entire, and, * * if this law is valid, we would have a law of Virginia which would control and regulate carriers in the most distant States."

That it is competent for a State to legislate touching the proof and authenticity of contracts made within its limits cannot be seriously questioned. Indeed, counsel for the appellant admit that State statutes relating to insurance policies and parol agreements are valid and constitutional because "the power to legislate on such matters has never been surrendered by the States."

We insist that the State has never parted with its right to legislate touching the formality and proof of contracts, no matter what they may relate to.

"The law of the place where the contract is entered into is to govern as to everything that concerns the proof and authenticity of the contract, and the faith which is due to it; that is to say, in all things which regard its solemnities and formalities. The law of the place of the contract is generally to govern in everything which forms the obligation of the contract, or what is called *vinculum obligationis;* the intrinsic and substantive form of the contract; * * * in questions whether the rights which arise from the nature and time of the contract are lawful or not, the law of the place of the contract is to govern." 3d Am. and Eng. Enc., 542; Story on Conflict of Laws, sec. 240.

This doctrine was distinctly recognized by this court in the case of *Pennoyer* vs. *Neff*, 95 U. S., 714, in which Mr. Justice Field delivering the opinion uses this language at page 722:

"The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, *the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced.*"

In the case of *Pennsylvania Railroad Company* vs. *McCann*, 42 N. E. Rep., 768, an action was brought by McCann against the Railroad Company for damages sustained in the

course of his duties as employee of said company upon the ground that his injuries resulted from defective appliances upon the train. The line of railroad upon which the plaintiff worked was operating between Youngstown in the State of Ohio to a point within the State of Pennsylvania where the accident occurred. The action was brought in the State of Ohio, and under a statute of that State it is provided that when defects are made to appear in the machinery or attachments of certain railroads, in actions for injuries to its employees, such defects shall be *prima facie* evidence of negligence on the part of the railroad. The defendant company objected that this rule of evidence as established by the statute had no application to the case at bar because the injury had been sustained beyond the limits of Ohio. But the court in an opinion delivered by Bradbury, J., overruled this objection. At page 769 the learned Judge uses this language:

"There can be no doubt respecting the general power of a State to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, over which its legislative department necessarily has authority, limited only by the constitutional guarantees respecting due process of law, vested rights and the inviolability of contracts."

And referring to *Railroad Company* vs. *Mitchell* (Georgia), 18 S. E, Rep., 290, Judge Bradbury quotes as follows:

"Touching the evidence requisite to make a *prima facie* case in behalf of the plaintiff below, the court gave in charge to the jury the rule of law applicable in this State between the parties where the cause of action is against a railroad company for a personal injury sustained by one of its employees in consequence of the negligence of the company. * * * This was correct, although the injury sued for was sustained in the State of Alabama. The quality or degree of evidence requisite to sustain an action, or to change the burden of proof, is determined by the law of the forum, and not by the law of the place where the cause of action

arose. It belongs not to the law of rights, but to the law of remedy." The Court of Appeals of New York held in 1876, that "an act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid."

Howard vs. *Moot*, 64 N. Y., 262.

See also *People* vs. *Cannon*, 139 N. Y., 32 c. c; 36 Am. State Rep., 668.

In *Ogden* vs. *Saunders*, 12 Wheaton, 262, Mr. Justice Washington in the course of his opinion uses this language:

"The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former supplying *a rule of evidence*, and the latter forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing *a rule of evidence*. All this I admit."

And Mr. Chief Justice Marshall in his opinion at pages 349–50 shows that a State legislature has full power to prescribe any formalities necessary to the obligation of contracts between its citizens. He instances the statute of frauds, acts against usury and statutes of limitations as illustrating this rule, and then adds:

"In prescribing the evidence which shall be received in its courts and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceedings in its courts."

The Chief Justice makes an important distinction at this point also, which counsel for the appellant in this case seem to have entirely diregarded. He says:

"The obligation must exist before it can be impaired; and a prohibition to impair it when made, does not imply an inability to prescribe those circumstances which shall create its obligation."

So we insist that there can be no regulation of bills of lading, as instruments of inter-state commerce, until the contract of shipment exists; it does not exist until agreed to by both parties; and the statute of Virginia only prescribes regulations which must precede the obligation of the contract; and it is therefore clearly not within the prohibition of the constitutional provision touching inter-state commerce.

Counsel for the appellant contend, however, that the practical effect of the legislation in this case is to impose a liability or penalty upon the initial carrier unless the contract is in writing and signed by the shipper. The answer to this is plain. Counsel for the appellant admit, and indeed insist, that the parties have a right to make such a contract as to their mutual liability as they may see fit. If so, then the carrier has a right to assume any amount of liability, regardless of what the common law would impose, and in the absence of legal proof to the contrary it is no greater hardship on the carrier to assume that it undertook to convey the property safely to its destination than it would be upon the shipper to assume that he took all the risk of safe carriage. Indeed, it is much more consonant with reason and justice that the presumption should be against the carrier rather than the shipper.

The consignor cannot be supposed to know in the case of a continuous line who are the owners of its different portions, and if compelled to seek out the negligent carrier he would find his task often difficult and sometimes impossible. He could hope for but little aid from the associated carriers, and might be obliged to assert his claim for compensation, in case of loss, against a distant party among strangers, under circumstances such as would discourage a prudent man from pursuing his legal remedy at all. Such a rule is obviously an impediment to and a burden upon commerce. The construction should be that the first carrier is the re-

sponsible party, and the intermediate roads his agents. Carriers possess facilities for tracing lost packages which the consignor does not have and cannot obtain; and they may without injustice or inconvenience charge the loss to the agent responsible for the negligence.

2 Am. and Eng. Enc. of Law, p. 860.
1 Woods' Rep., 186-7.

This is the English rule adopted with modification by our revisers, and we submit that the section under examination is in aid of commerce between the States, promoting its freedom, rather than operating to check or interfere with the same.

Bogg vs. *Wilmington Railroad Company*, 109 N. C., 279; s. c. 26 Am. St. R., 569.

Counsel for appellant refers to the case of *Railroad Company* vs. *Manufacturing Company*, 16 Wallace 324, where Mr. Justice Davis recognized the American rule restricting the liability of the initial carrier to its own line; but they failed to give proper emphasis to an important qualification of the statement as made by this court, viz: that such rule was only applicable "*in the absence of any special contract.*" So that the question again recurs, what in fact is the contract between the parties, and by what rule of evidence are the terms of such contract to be ascertained? As was said by this court in *New Jersey Steam Navigation Company* vs. *Merchants Bank*, 6 Howard, 383, where the carrier claimed exemption from liability under its bill of lading and published notice:

"But admitting the right thus to restrict his obligation, it by no means follows that he can do so *by any act of his own.* He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is

not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of *Hollister* vs. *Nowlen*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

"The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

We respectfully submit that so far from the statute in question operating as a burden upon, or an impediment of the the freedom of inter-state commerce, its purpose and tendency are just the reverse, since it relieves a shipper of the difficult and vexatious obligation to follow up his merchandise through all its meanderings, except where he distinctly undertakes this duty.

If permitted to go outside the printed record in this cause, as counsel for the appellant have so freely done, we might state the fact that the appellee, in accepting the through bill of lading from Richmond, Va., to Bayou Sara, La., did not know, and had no means of knowing, over what connecting lines or at what risk the goods would travel before reaching their destination. Certainly the appellee had no idea that there would be any water risk, or they would have taken out marine insurance according to their custom. If this property had gone overland throughout the line of transportation, as appellee supposed it would, this case could not have been here for adjudication. And no better illustration could be

adduced of the hardship of the American rule which the Virginia Legislature designed to modify.

Counsel for the appellant have seen fit to testify at some length in their brief as to the rules and rates of carriers. We cannot follow them into these intricate and technical questions, and submit that it is wholly improper to consider them now, as they did not make these things a matter of record in the usual way. But we fail to catch the force of their argument, that the Virginia statute operates indirectly to regulate the compensation of the carrier of inter-state business. The liability for safe carriage rests *somewhere*, in any event, and in giving a through bill of lading at through rates, the question of risks is considered in making the rate. The English rule, and the statute of Virginia, in the absence of a special contract evidenced in the manner prescribed, simply treats the initial carrier as having assumed the liability as between it and the shipper for the entire route, and in case the loss occurs on some connecting line, its redress is over against the party in whose hands the loss occurred. We repeat, then, that the element of risk is the same under the statute as without the statute, the question relating only to primary liability.

Counsel for the appellant also volunteers the information that there is a difference in practice between the shipment of live stock, where bills of lading are signed by the shipper (*Hart* vs. *Pennsylvaaia Railroad Company*, 112 U. S., 331,) and the shipment of other classes of property where, they say, bills of lading are not signed by the shipper, and cannot be so signed without operating as a great hardship upon the parties; and they assign as a reason that the shipper of live stock, or his agent, can read and write, while the shipper of other classes of goods, or his agent, cannot read and write. This strikes us as being a most remarkable proposition. Why the cattle raiser or his cow-boy should be supposed to possess higher educational qualifications than a manufacturer

of tobacco, or his agent, we are unable to concieve. Besides, counsel for appellant must know that many people sign contracts without being able to read or write, by making their mark before some witness; and we submit that even if there were anything in the distinction which counsel seek to make between persons handling live stock and persons handling other kinds of property, it would be no argument whatever against the statute under examination. It could hardly be contended for a moment that the statute of frauds is any great hardship because an illiterate man is unable to sign his name. There is no exception made by the statute in favor of such person, and we doubt whether such a claim was ever set up in any court.

Counsel for the appellant undertake to show that if the several States are allowed to legislate upon this subject as Virginia has done "there may be as many different and conflicting provisions as there are States, thus leading to an interminable confusion and embarrassment." (Appellant's brief at page 19.) And again they say, illustrating this proposition, "either the consignor in Virginia or the consignee in Louisiana can sue for the loss of these goods. Virginia has seen fit to say to the carrier, you shall be liable unless you make your contract in a different way. Under such circumstances how could the rights of the parties to this contract be properly determined?" In answer to this question we would again remind the learned counsel of the doctrine of *lex loci contractus*, which is the law, and the only law governing the parties.

In *Liverpool Steam Co.* vs. *Phœnix Insurance Co.*, 129 U. S., page 397, Mr. Justice Gray, delivering the opinion of the court, says at page 397:

"This court has not heretofore had occasion to consider by what law contracts like these now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and

their interpretation, by the law of the place where they were made unless the contracting parties clearly appear to have some other law in view."

That was a case where a contract of affreightment was made in New York by an American shipper with an English Steamboat Co. doing business there for the shipment of goods at that point for through carriage and delivery at Liverpool, and the question was whether the American or the English rule governing such contracts was applicable. This court held, after great consideration and an elaborate review of all the authorities, that the law of the place of shipment controlled the parties. Further on in the opinion at page 458 this court uses the following language:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

And again on page 459 of the same case we find this language:

"The contract being made in New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of goods, is one continuous act to begin in the port of New York to be chiefly performed on the high seas, and to end at the port of Liverpool."

It appears, therefore, that if the *lex loci contractus* is to govern in any action upon the contract between the parties,

there is no possible danger of the "interminable confusion and embarrassment" apprehended by counsel for the appellant resulting from conflicting legislation between the various States. See also *The Henry B. Hyde*, 82 Fed. Rep., *supra*.

There is no possible analogy between the legislation of Virginia in question and that of Indiana in respect to the delivery of telegraph messages which came before this court in the case of *Western Union Telegraph Company* vs. *Pendleton*, 122 U. S., 347. The inevitable tendency to conflict and confusion in that case is obvious, as pointed out by Mr. Justice Field in his opinion at pages 258-9.

The authorities relied on by counsel for appellant are easily disposed of. We submit that they have no bearing upon the question at issue.

In *Louisville, &c., Railroad Company* vs. *Railroad Commissioners of Tennessee*, 19 Fed. Rep., 679, an act creating the Railroad Commission was declared invalid, (1) because it was *too indefinite;* and (2), because it violated the *Fourteenth Amendment* to the United States Constitution by discriminating against railroad corporations, which are *persons*.

In *Almy* vs. *California*, 24 Howard, 169, an act imposing a stamp tax on bills of lading for the transportation of gold, &c., out of California, was held repugnant to that clause of the Federal Constitution forbidding any State to lay a *tax on exports*.

In *Railroad Company* vs. *Husen*, 95 U. S., 465, a statute of Missouri prohibited the driving of cattle through that State, whether diseased or not, and this court held that the Legislature could not thus interfere with transportation into and through said State.

In *Walton* vs. *Missouri*, 91 U. S., 275, another statute of Missouri came under review which undertook to impose *a*

license tax on peddlers selling merchandise from outside the State, but this court held that a license tax required for the sale of goods is in effect a *tax upon the goods themselves*.

But see *In Re May*, 82 Fed. Rep., 422.
Machine Company vs. *Gage*, 100 U. S., 676.

In *Mobile* vs. *Kimball*, 102 U. S., 691, a statute of Alabama establishing a Board of Commissioners to improve the harbor came before this court and was sustained, upon the ground that said act dealt with matters local in their nature and intended to aid rather than interfere with inter-state commerce.

In *Brown* vs. *Houston*, 114 U. S. 622, coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania was taxed under the Louisiana statute, which was assailed as unconstitutional among other reasons, because obnoxious to the commerce clause of the Federal Constitution; but this court pronounced said statute valid, affirming the judgment of the State court.

In *Bowman* vs. *Railway Company*, 125 U. S., 465, a statute of Iowa forbidding common carriers to bring intoxicating liquors into that State except under certain rigid restrictions was declared unconstitutional by this court, three judges dissenting and one being absent.

In the court below counsel for the appellant here put their main reliance upon the case of *Norfolk & Western Railway Company* vs. *Commonwealth*, 88 Va., 95. This was a decision construing the statute of Virginia governing the running of railroad trains on Sunday, the Court of Appeals of Virginia having decided in said case that such act was unconstitutional. That case, however, has since been overruled by the decision in *Norfolk & Western Railway Company* vs. *Commonwealth*, 93 Va., 749, and this latter view was announced

about the same time by this court in *Hennington* vs. *State of Georgia*, — U. S.

Counsel undertake to fortify their attack upon the first clause of section 1295, under which we claim, by insisting that the second clause of said section is unreasonable, etc. We need only remark that upon well-established principles, even if the latter were open to constitutional objection, this part might be declared void without setting aside what is free from such objection, since they are not at all dependent upon one another. But we suppose the court will hardly undertake to pass upon the validity of this statute further than may be necessary to decide the case now before it.

Respectfully submitted,

A. W. PATTERSON,
Solicitor and Counsel for Appellee.

RICHMOND AND ALLEGHANY RAILROAD COMPANY *v.* R. A. PATTERSON TOBACCO COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 172. Submitted January 4, 1898. — Decided February 21, 1898.

Section 1295 of the Virginia Code of 1887, enacting that "when a common carrier accepts for transportation anything, directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge" does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line; and it does not conflict with the provisions of the Constitution of the United States, touching interstate commerce.

THE case is stated in the opinion.

Mr. H. T. Wickham and *Mr. Henry Taylor, Jr.*, for plaintiff in error.

Opinion of the Court.

Mr. A. W. Patterson for defendant in error.

Mr. Justice White delivered the opinion of the court.

In August, 1888, the Patterson Tobacco Company delivered to the Richmond and Alleghany Railroad, which was then in the hands of receivers, a lot of tobacco consigned to Mann and Levy, Bayou Sara, Louisiana. On receiving the tobacco the railroad issued a bill of lading whereby it was expressly stipulated that it should only be liable for the transportation of the goods over its own line, and beyond this was to be responsible solely as a forwarder, that is to say, that all its obligations should be discharged if it safely carried the goods over its own road, and delivered them to a connecting carrier. The limitations on this subject in the bill of lading were full and clear, and there is no question that if the rights of the parties are to be measured by the terms of the bill of lading, the carrier was not liable for a loss happening beyond its line. When this shipment was made there was no law of the State of Virginia forbidding or purporting to forbid a carrier, in receiving goods for interstate shipment, from restricting its liability in accordance with the tenor of the bill of lading in question. In fact, the Supreme Court of Appeals of Virginia in this case expressly held that the Virginia law sanctions a contract made by a carrier to that effect. The bill of lading for the tobacco, issued as above stated, was not signed by the shipper, although at the time the freight was received and when the bill was issued the Code of Virginia contained the following provision:

"When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof

to the consignor that the loss or injury did not occur while the thing was in his charge." Sec. 1295, Virginia Code of 1887.

The tobacco not having been delivered to the consignees, the shippers sued the Richmond and Alleghany Railroad for the value thereof, on the assumption that the railroad was responsible as a common carrier for the non-delivery. The corporation relied for its defence on the contract embodied in the bill of lading, and on the fact that the tobacco had been duly transferred to a connecting carrier, and was thereafter lost. The case was submitted to the trial court on an agreed statement, admitting the receipt of the goods, the issue of the bill of lading, the fact that it was not signed by the shipper, and the loss of the tobacco beyond the lines of the defendant. The plaintiff rested on the statute above quoted, and the defendant company on its claim that the statute was a regulation of interstate commerce, and therefore in conflict with the Constitution of the United States. The trial court held the railroad liable, and from a judgment of the Supreme Court of Appeals of the State of Virginia, affirming its action, this writ of error is prosecuted.

The Supreme Court of Appeals of Virginia in its able opinion, and the counsel of both parties at bar conceded, that an attempt on the part of a State to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines would be a regulation of interstate commerce, and therefore void. We shall, therefore, not examine this question, but shall proceed to a consideration of the case without expressing any opinion upon it. It is manifest that the statute of the State of Virginia in question does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as to liability on an interstate shipment beyond its own line as it may deem proper, provided only the

evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form is as obvious as is the difference between the sum of the obligations of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown.

The failure to bear this plain distinction in mind is the fallacy which is involved in all the contentions which are pressed by the plaintiff in error. It is of course elementary that, where the object of a contract is the transportation of articles of commerce from one State to another, no power is left in the States to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several States to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least, until Congress, by general legislation, has undertaken to govern the subject. But it is said, although the learned court below announced as an abstract principle that under the law of Virginia a carrier was free, when receiving an interstate shipment, to limit his liability to his own line, the conclusion reached by the court was inconsistent with this ruling, and, in effect, substantially repudiated its correctness. The line of reasoning by which this proposition is supported is this: If there had been no statute, it is said, the court admitted that the terms of the bill of lading would have exempted the carrier from liability beyond its own line, but by applying the statute to the bill of lading it did not so exempt the carrier, therefore the statute was so enforced as to prevent the carrier from contracting, and hence its application negatived the power to contract for such exemption. But the inconsequence is in the argument of the plaintiff in error and not in the reasoning or the conclusion of the court. The inadequacy of the bill of lading to protect the carrier from liability beyond

its own line resulted, it is true, from the statute, but not because the statute forbade the carrier from contracting so as to limit his liability, but because the contract which he did make was not in the form required by law, and therefore was not evidence that there was such a contract. Indeed, the entire argument upon which it is asserted that error was committed by the court below, but manifests in varying forms of statement the fallacy already noticed, that is, it comes from obscuring the difference between substance and form, between a power to contract and the asserted right in availing of the authority, to disregard the requisites essential to show a valid contract, and this confusion of thought also marks the difference between the case now presented and the very many adjudged cases cited by the plaintiff in error in support of its proposition.

Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary. In the case of *Chicago &c. Railway Co.* v. *Solan*, 169 U. S. 133, 137, 138, it was said:

"They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

"Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving or management of all railroad trains passing through the State to submit to an

examination by a local board as to their fitness for their positions, or to prescribe the mode of heating passenger cars in such trains. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628. See also *Western Union Telegraph Co.* v. *James*, 162 U. S. 650; *Hennington* v. *Georgia*, 163 U. S. 299; *Gladson* v. *Minnesota*, 166 U. S. 427."

These views dispose of the substantial questions which the case presents, for the contention which arises on the concluding sentences of the statute, imposing upon a carrier a duty where the loss has not happened on the carrier's own line to inform the shipper of this fact, is but a regulation manifestly within the power of the State to adopt.

Affirmed.